No. 73-1471

In the Supreme Court of the United States

OCTOBER TERM, 1973

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UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

NEW JERSEY STATE LOTTERY COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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v.

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The Solicitor General, on behalf of the United States and the Federal Communications Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–10a) is not yet reported. The Commission's memorandum opinion and order (App. C, *infra*, pp. 13a–26a), which was reversed by the court of appeals, is reported at 36 FCC 2d 93.

JURISDICTION

The judgment of the court of appeals was entered on January 2, 1974 (App. B, *infra*, pp. 11a–12a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the prohibition in 18 U.S.C. 1304 of the broadcast of "any * * * information concerning any lottery" or of "any list of the prizes drawn or awarded by means of any such lottery" applies to the announcement during newscasts of the winning number in the New Jersey State Lottery, and is constitutional as so applied.

STATUTES INVOLVED

18 U.S.C. 1304 provides:

> Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

47 U.S.C. 326 provides:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

47 U.S.C. 312 provides:

> (a) The Commission may revoke any station license or construction permit——
>
> * * * * * *
>
> (6) for violation of section 1304, 1343, or 1464 of Title 18.

47 U.S.C. 503 provides:

> * * * * * *
>
> (b)(1) Any licensee or permittee of a broadcast station who——
>
> * * * * * *
>
> (E) violates section 1304, 1343, or 1464 of Title 18,
>
> shall forfeit to the United States a sum not to exceed $1,000. Each day during which such violation occurs shall constitute a separate offense. Such forfeiture shall be in addition to any other penalty provided by this chapter.

STATEMENT

On Thursday morning, each week, the New Jersey State Lottery Commission draws and announces the winning lottery number. Broadcasters, including Jersey Cape Broadcasting Corp., licensee of WCMC–AM–FM–TV, are notified of the winning number by Associated Press teletype machines. Many of Jersey Cape's listeners are aware of this fact, and "each Thursday the station is bombarded with scores of tele-

phone calls by residents requesting the winning number" (App. 4a).[1]

Jersey Cape sought a declaratory ruling from the Federal Communications Commission as to whether broadcast announcement of the winning lottery number would constitute a violation of 18 U.S.C. 1304, which bars the broadcast of "any * * * information concerning any lottery * * *." Under the Communications Act, the Commission may revoke the license of, or impose a daily forfeiture of $1,000 upon, any licensee who violates Section 1304. 47 U.S.C. 312(a)(6), 503(b)(1)(E). Jersey Cape proposed to broadcast during three consecutive newscasts on the day of the lottery drawing the following statement (App. 5a):

> The winning state lottery number drawn today is (and then recite the winning number).

It contended that the proposed broadcast would not constitute a lottery or direct promotion of a lottery. Rather, it urged "that the prime effect of the broadcast would be to inform the listening public of a legitimate news items about which they have a keen interest, and, that only 'incidently' is there any promotion of a lottery" (*ibid.*).

In a declaratory ruling on July 20, 1971, 30 FCC 2d 794, the Commission concluded[2] that the announcement would constitute a direct promotion of a lottery, and thus is barred by 18 U.S.C. 1304, as construed in *New York State Broadcasters Association* v. *United States*, 414 F.2d 990 (C.A. 2), certiorari denied, 396 U.S. 1061. There the Second Circuit held that 18 U.S.C. 1304, *inter alia*, prohibits broadcasts of "so-called news that directly promotes the Lottery, e.g., broadcasting lists of winners." 414 F.2d at 999.

In a petition for reconsideration the New Jersey State Lottery Commission described the operation of the lottery in more detail (App. 18a–20a). It pointed out that one number drawn each week is the basis for the award of 18,000 or more prizes; that approximately 2.75 million people per week purchase New Jersey State Lottery tickets; and that this group represents approximately 58 percent of the adult population of the State.

Relying largely on the Second Circuit's opinion in *New York State Broadcasters, supra*, the Commission again rejected the proposal to permit the winning number to be announced over the airways (App. 24a–38a). It stated that the mere fact that the stations receive the winning lottery number from independent wire services does not establish that such information is "to be regarded as a legitimate news story appropriate for broadcasting," and that the popularity of the lottery "cannot change the law to permit the broadcast of information directly promoting a lottery" (App. C, *infra*, p. 21a). The Commission added that "* * * petitioner's admission that it needs to announce the winning number over the air because it does not have the information necessary to deter-

[1] "App." refers to the Appendix in the court of appeals, a copy of which has been lodged with the Clerk.

[2] Before announcing its decision, the FCC requested the views of the Criminal Division of the Department of Justice, which expressed its continuing opposition to any "relaxation of restrictions on legal gambling," and recommended that the Commission view the broadcast of the winning lottery number as a promotional announcement (App. 8a–9a, 10a–11a).

mine the identity of the winner merely serves to reinforce the finding that the broadcasts of the winning number would directly promote the lottery, or as we said in *Jersey Cape,* that the 'widespread dissemination' of this information is 'reasonably necessary or helpful to the conduct of the lottery' " (App. C, *infra,* p. 23a).

The Commission recognized "the anomalous situation where the several states have enacted state lottery legislation and in accordance therewith are operating constitutional State lotteries and, in an effort to bring the lottery to the attention of their citizens, desire to utilize the broadcast media" (App. C, *infra,* p. 26a). But it held that it had "no alternative but to apply the requirements of" Section 1304 until it is amended or qualified, and that "[t]he issue is for Congress and not the Commission to resolve * * *" (*id.* at 26a, 24a).

On the Lottery Commission's petition for review, the Court of Appeals for the Third Circuit, *en banc,* unanimously reversed the Commission's ruling. The court held that the Commission had misconstrued 18 U.S.C. 1304, since, in the court's view, "[n]othing in that statute was intended to permit the exercise by the FCC of control over editorial decisions of broadcast journalists" (App. A, *infra,* p. 5a). The court viewed the Commission's ruling as inconsistent with the First Amendment's guarantee of freedom of the press.

In an effort to reconcile Section 1304 with that guarantee and with the anti-censorship provisions of 47 U.S.C. 326, the court concluded that news broadcasts are exempt from the prohibitions of Section 1304, which should be construed to apply only "to promotion of lotteries for which the licensee receives compensation" and perhaps also to "some uncompensated promotional announcements outside the context of broadcast journalism [which] might be found by the FCC to be promotional, and not news * * *" (App. A, *infra,* p. 9a).

REASONS FOR GRANTING THE WRIT

Eight states presently conduct lotteries to raise revenue.[3] There is, however, a long established federal statutory policy barring use of the mails or of the channels of interstate commerce for the conduct of lotteries, whether or not legal under state law. *In re Rapier,* 143 U.S. 110. It is illegal to import lottery tickets or to transport them in interstate commerce (18 U.S.C. 1301), to disseminate them in the mails (18 U.S.C. 1302), or to broadcast "any * * * information concerning any lottery" (18 U.S.C. 1304). In addition, it is illegal under 18 U.S.C. 1953 for non-common carriers to carry or send wagering paraphernalia, such as lottery tickets, in interstate commerce. *United States* v. *Baker,* 364 F.2d 107 (C.A. 3), certiorari denied, 385 U.S. 986.[4]

[3] They are New Jersey, New York, Pennsylvania, Massachusetts, Connecticut, Michigan, Maryland and New Hampshire. In addition, on November 6, 1973, a Maine referendum approved establishment of a state lottery and a Rhode Island referendum repealed a ban on such lotteries in the state constitution.

[4] The express anti-lottery policy of these statutes distinguishes them from 18 U.S.C. 1952, which bars travel or use of the mails or facilities in interstate or foreign commerce to carry on unlawful activities, including gambling where barred by state law. Cf. *Erlenbaugh* v. *United States,* 409 U.S. 239, holding that shipment of a "scratch sheet" in commerce violates Section 1952.

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Congress' intention that the Federal Communications Commission should apply this policy to broadcast licensees is clearly stated. 47 U.S.C. 312(a)(6), 503(b)(1)(E). However, serious questions under the First Amendment may arise in the application of Section 1304 to broadcasting. To narrow these questions, the Court of Appeals for the Second Circuit has held that only information directly promoting a lottery is barred from broadcast by Section 1304. *New York State Broadcasters Association* v. *United States, supra.* In the instant case, the Third Circuit has held, to the contrary, that a broadcaster may carry information which directly promotes or facilitates a lottery, such as the winning ticket number, so long as it is not directly compensated for doing so; if it carries the information in the name of editorial "news" judgment, the statute is not applicable.

1. In *New York State Broadcasters, supra,* the Second Circuit reviewed a declaratory ruling by the Commission that Section 1304 bars advertising and other broadcasting which would promote lotteries, whether legal or illegal. The Commission had refused in that case to issue specific rulings on such questions as whether news reports of recent events about or relating to the New York State Lottery could be broadcast; the legality of broadcasting unpaid announcements indicating places where lottery tickets could be purchased and where and how tickets would be drawn; the legality of live broadcasts of lottery drawings; or whether interviews with persons holding winning tickets in either legal and illegal lotteries could be

broadcast (414 F. 2d at 992–993). The Commission had stated, however, that Section 1304 does not bar ordinary news reports on public policy concerning lotteries (*id.* at 993–994).

The Second Circuit generally upheld the constitutionality of Section 1304, but stated that it must be narrowly and carefully construed; it set aside the Commission's ruling and directed it to address the specific questions noted above. In doing so, the court noted that the Commission's judgments as to what types of lottery information may be broadcast must be considered "not as an exercise of the power to regulate broadcasting in the public interest necessitated by the nature and technology of broadcasting, but as enforcement of the clear congressional policy embodied in section 1304" (*id.* at 995).

The court in *New York State Broadcasters* further stated that the statute would be unconstitutional if read literally to prohibit all information concerning lotteries. Relying, however, upon past interpretations of mail statutes (upon which Section 1304 had been based), the court concluded that Congress intended to prohibit the possibility that the airwaves would be used for advertisements and information that directly promotes a particular lottery (414 F. 2d at 998):

> There is a difference between information directly promoting a lottery and information that is simply "news" of a lottery. If a "news" item has the incidental effect of promoting a lottery, it is not banned; but if a lottery advertisement or announcement contains "news," such as the

> amount a lottery realized for education, it would nonetheless be banned. We are aware that at times the line may be thin, but this will be the unusual rather than the common case because advertisements and announcements will ordinarily be more direct and exhortative.

The court specifically held that the statute bars "so-called news that directly promotes the Lottery, e.g., broadcasting lists of winners." 414 F. 2d at 999.

On remand in the *New York State Broadcasters* case, the Commission issued a Supplementary Declaratory Ruling, implementing the Second Circuit's decision (21 FCC 2d 846). It ruled that Section 1304 prohibits broadcasts, whether paid or unpaid, "of the places where lottery tickets may be purchased, where, how, and when winning tickets will be drawn, the amount of prizes, and how the proceeds of the sales of lottery tickets are and will be distributed" (App. C, *infra*, p. 20a). In the present case the Commission held that under this ruling Section 1304 also bars broadcasts of the winning number in the New Jersey State Lottery (*ibid.*).

The Second Circuit's decision in *New York State Broadcasters* thus interprets Section 1304 quite differently from the Third Circuit's decision in the instant case. The Second Circuit's test emphasizes whether the broadcast directly promotes or facilitates the lottery. The Third Circuit's test concentrates instead on the financing of the broadcast—whether the station is paid to present the announcement. And the two courts clearly differ on the result required by the statute with

respect to the kind of announcements at issue here. The Court should grant this petition in order to resolve this conflict in the circuits, and because the decision below has effectively declared a portion of an Act of Congress unconstitutional.

2. The Third Circuit's decision in this case was obviously intended to protect the journalistic discretion of the news media. That discretion is at the heart of the First Amendment. But certain narrowly defined categories of communication, even when carried on by the press, are not within the broad protection of that Amendment. *E.g., Valentine* v. *Chrestensen,* 316 U.S. 52, and *Pittsburgh Press Co.* v. *Human Relations Commission,* 413 U.S. 376 (commercial speech)[5]; *Roth* v. *United States,* 354 U.S. 476, and *Miller* v. *California,* 413 U.S. 15 (obscenity); *Donaldson* v. *Read Magazine,* 333 U.S. 178, 189, and *Public Clearing House* v. *Coyne,* 194 U.S. 497 (schemes to defraud). Communications which serve only to implement, promote or facilitate gambling schemes, including state-operated lotteries, are in the same category. *In re Rapier, supra,* 143 U.S. at 134–135; *New York State Broadcasters, supra.*

The Third Circuit's attempt to distinguish between broadcasts of winning numbers for which the broadcaster is directly compensated and "newscasts" of the same information is not supportable. The substantive nature of the information communicated, not its form as "editorial" or "advertising" matter, governs the

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[5] In *Pittsburgh Press* this Court took express note of the decision in *New York State Broadcasters, supra,* 413 U.S. at 387, n. 11.

scope of the First Amendment's protection. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 266. And it is immaterial, for First Amendment purposes, that one who publishes information may have been directly compensated for doing so (*ibid.*). *Pittsburgh Press, supra*, 413 U.S. at 384–385. Indeed, broadcasters are obviously "compensated" for announcing lottery numbers by the large audience of gamblers they attract. This in turn attracts advertisers and affects the rates they can be charged. In sum, the Third Circuit's holding that Section 1304 bars a broadcaster from carrying paid announcements of winning numbers, but permits him regularly to broadcast the same information as "news" in his journalistic discretion, completely defeats the purpose of Section 1304 without serving any First Amendment values. There is a clear difference between news about activities on which people gamble and information which has no purpose other than the conduct of gambling. *New York State Broadcasters, supra*, 414 F. 2d at 997.

Information about horse races, sporting events, and even the stock and commodity markets are of interest to large numbers of people who may gamble on such matters. But such information also has intrinsic meaning, wholly apart from gambling, for persons who are interested in sports or who have an economic, governmental, or scholarly interest in the markets. Winning lottery numbers, on the other hand, have no meaning except in connection with consummating the lottery itself. Announcement of the winning numbers "does not affect the political process, does not

contribute to the exchange of ideas, does not provide information on matters of public importance, and is not * * * individual self expression."*

Since announcement of the winning numbers serves only to carry on the lottery, it is conduct which Congress may bar from the public airwaves and the channels of interstate commerce, rather than protected speech.

Nothing in the Commission's narrow ruling in this case precludes the broadcast of news stories, documentaries, debates, or discussions concerning the merits of lotteries, their effects, or the way they are being administered by the state. Cf. *Pittsburgh Press, supra*, 413 U.S. at 385. On the contrary, these First Amendment interests have been scrupulously preserved by the Commission, following the Second Circuit's standards. But the Commission would have been "remiss in its duties if it failed, in the exercise of its * * * authority, to aid in implementing [Section 1304]," with respect to the narrow areas of communication to which that statute applies. *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, 289.

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* *Banzhaf* v. *Federal Communications Commission*, 405 F. 2d 1082, 1101–1102 (C.A.D.C.), certiorari denied *sub nom. Tobacco Institute, Inc.* v. *Federal Communications Commission*, 396 U.S. 842.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1974.

APPENDIX A

United States Court of Appeals for the Third Circuit

No. 72-1878

NEW JERSEY STATE LOTTERY COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA AND

FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

COMMONWEALTH OF PENNSYLVANIA, STATE OF NEW HAMPSHIRE, INTERVENORS

On Petition for Review of an Order of the Federal Communications Commission

Argued May 15, 1973

Before VAN DUSEN, GIBBONS and ROSENN, Circuit Judges

Submitted On Rehearing November 15, 1973

Before SEITZ, Chief Judge, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, Circuit Judges

Opinion of the court

(Filed January 2, 1974)

GIBBONS, *Circuit Judge:* This case is before us pursuant to 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a) on the petition of New Jersey State Lottery Commission to review a declaratory ruling of the Federal

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Communications Commission. Proceedings before the FCC commenced in February 1971 when Jersey Cape Broadcasting Corporation, a licensee of broadcast frequencies operating in Wildwood, New Jersey, filed a request for a declaratory ruling on the question whether its broadcast of the winning weekly number in the New Jersey State Lottery would violate 18 U.S.C. § 1304. Jersey Cape proposed to broadcast, during three consecutive regular news broadcasts on each Thursday, the day of the lottery drawing, and at no other time, a statement:

> The winning state lottery number drawn today is (and then recite the winning number).

In its declaratory ruling issued July 14, 1971 the FCC ruled that the proposed statement would violate 18 U.S.C. § 1304 and the FCC's rules interpreting that statute. 36 Fed. Reg. 13813 (1971). In a second ruling on July 27, 1971 the FCC made clear that its ruling prohibited the statement even as a news item in a regular news broadcast. 36 Fed. Reg. 14347 (1972). Thereafter petitioner New Jersey State Lottery Commission, pursuant to 47 U.S.C. § 405[1] filed with the FCC a timely petition for reconsideration. The FCC decision before us denied this petition for reconsideration. *In re Jersey Cape Broadcasting Corp.*, FCC 72–702, filed July 27, 1972. The Lottery Commission filed a petition for review of the July 27, 1972

[1] 47 U.S.C. § 405 provides:

"After an order * * * or action has been made or taken in any proceeding before the Commission * * * any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing * * *."

The FCC does not challenge the Lottery Commission standing.

Memorandum and Order in this court within the time permitted by the statute.[2] 47 U.S.C. §§ 402(c), 405.

Before the FCC the Lottery Commission established its status as a person aggrieved or whose interests would be adversely affected. The State Lottery is authorized by a 1969 amendment to the state constitution and by the State Lottery Law, N.J. Stat. Ann. §§ 5:9–1 to 5:9–25. The Lottery Commission commenced sale of lottery tickets in December 1970. The winning number is drawn every Thursday morning. The Lottery Commission claims that each Thursday it is confronted with a difficult problem in coping with the public demand for information of the winning number. Its telephone service was temporarily suspended on August 19, 1971, due to an overload of telephone calls. Records of the New Jersey Bell Telephone Company indicate that its twelve automatic answering and announcement machines in Newark, specially installed for the Lottery Commission to announce the winning numbers to callers in the northern half of New Jersey, receive an average of 5,500 calls between the hours of 9:30 a.m. and 2:30 p.m. on Thursdays. Five additional machines have been installed in Newark. In addition to the calls completed, 32,000 and 63,000 "overflow" calls were attempted on August 12 and August 19, 1971, respectively. Many phone calls requesting the winning lottery number have also been made to newspapers

[2] By order dated November 3, 1972, we granted motions of the states of New Hampshire and Pennsylvania to intervene as petitioners. The Maryland Public Broadcasting Corporation has filed a brief as amicus curiae in support of the petition for review.

throughout the state commencing at approximately 11:30 a.m. on Thursdays. On a typical Thursday, 2,750,000 ticketholders are interested in the winning number.

The FCC, in issuing the challenged ruling, acted pursuant to the Communications Act of 1934. *See* Act of June 19, 1934, ch. 652, 48 Stat. 1064, 1086, 1088, 1091. The provisions of that statute relevant to this case are found at 18 U.S.C. § 1304, 47 U.S.C. § 312(a)(6) and 47 U.S.C. § 326. 18 U.S.C. § 1304 provides:

> Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The FCC can under 47 U.S.C. § 312(a)(6) revoke any station license for a violation of 18 U.S.C. § 1304. 47 U.S.C. § 326 provides:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

In its ruling the FCC made no effort to reconcile the three statutory provisions. Relying entirely on 18 U.S.C. § 1304, on its *Supplementary Declaratory Ruling*, 21 F.C.C. 2d 846 (1970), and on the decision of the Second Circuit in *New York State Broadcasters Association* v. *United States*, 414 F.2d 990 (2d Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970) (which does not discuss 47 U.S.C. § 326), the FCC held that it had authority to prohibit a broadcast frequency licensee from announcing the winning lottery number as a news item in a regular news broadcast.[3] We conclude that the FCC misconstrued the congressional mandate in the Communications Act of 1934. Nothing in that statute was intended to permit the exercise by the FCC of control over editorial decisions of broadcast journalists. On the contrary as 47 U.S.C. § 326 makes clear, Congress expected the FCC's actions to be consistent with the first amendment.

The FCC ruling imposes a small prior restraint. It is, nonetheless, a prior restraint upon the dissemination of information of interest, on the day of the lottery, to perhaps 58% of New Jersey's adult population. There are three possible justifications for such a restraint. One is that the information is of such nature that it is not protected by the first amendment. *E.g.*, *Miller* v. *California*, 413 U.S. 15 (1973); *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973); *United States* v. *Orito*, 413 U.S. 139 (1973); *Kaplan* v. *California*, 413 U.S. 115 (1973); *United States* v. *12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123 (1973). The second is that although the information ordinarily is protected by the first amendment, the agency applying the restraint is exempt from its strictures. *E.g.*, *Lloyd Corp.* v. *Tanner*, 407 U.S. 551 (1972). The third is that although the information is protected and the agency is not exempt from the first amendment, the restraint is only reasonably

[3] *Compare* this position *with In re Broadcasting of Information Concerning Horse Races*, FCC 73-355, filed April 3, 1973.

incidental to the achievement of another valid governmental purpose. *E.g., Veterans and Reservists for Peace in Vietnam* v. *Regional Commissioner of Customs*, 459 F.2d 676 (3d Cir.), *cert. denied*, 409 U.S. 933 (1972).

The FCC does not urge the third justification; indeed 18 U.S.C. § 1304, as interpreted in the proceeding under review, has no purpose other than restraint upon the dissemination of information. The FCC does, however, urge both of the other justifications. In its initial decision on petitioner's request for a ruling, it held that the winning lottery number was not "news" and therefore was not protected by the first amendment. When the Lottery Commission petitioned for reconsideration, it held that even if the winning number had some news value to some persons, its broadcast would directly promote a lottery, and could therefore be prohibited by the FCC. On both grounds the FCC is wrong.

The contention that on Thursday afternoon the winning number in the New Jersey lottery is not "news", in a broadcast context, is simply frivolous. In *Rosenbloom* v. *Metromedia, Inc.*, 415 F.2d 892 (3d Cir. 1969), *aff'd*, 403 U.S. 29 (1971), we stressed the "hot news" value of broadcast news summaries given in hourly or half-hourly reports, and said:

> The primary value of these items to the public is in conveying the latest news as promptly as possible so that it has the opportunity to be informed of news items of possible immediate public concern. *Id.* at 895.

On Thursday afternoon and evening the winning lottery number is "hot news". By Friday afternoon it is merely history, with which broadcast journalism is only peripherally concerned. The FCC reasons that because the winning number is of interest to only a

limited class of persons (a mere 2,750,000 ticketholders on a typical Thursday), it is not an item of news, and hence is not protected information. Setting aside the question whether the first amendment recognizes a distinction between news and mere history, *see e.g., Winters* v. *New York*, 333 U.S. 507 (1948), we reject the premise that the size of the class of persons interested determines what is news. If this were the determinant, stock market quotations would not be news and, hence, apparently could be censored, since on any given Thursday more persons in New Jersey are interested in the winning lottery number than in the closing price of any given security. If this were the determinant, most obituaries would not be news; the arrivals of out-of-town buyers in the clothing market would not be news;[4] the expected time of arrival of a steamship would not be news.[5] The first amendment makes clear that it is beyond the competency of any governmental agency to determine, a priori, that any item of information is, for any news medium, not news.

Broadcast news media, because of the immediate and highly transitory nature of their news coverage, present particular problems in this regard. They, above all news media, serve the public need to be informed on what is of immediate though of passing interest. They at least as much as the other news media should be left free to make their own editorial decisions as to what news will best serve their public. The only restraints on information by which, in the news context, the broadcast media may constitutionally be bound are those imposed by what little is left of the law of libel since *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and its progeny, and by the

[4] *See* New York Times weekly report.
[5] *See* New York Times daily report.

law of obscenity, *e.g. Miller* v. *California, supra; Paris Adult Theatre I* v. *Slaton, supra; United States* v. *Orito, supra; Kaplan* v. *California, supra; United States* v. *12 200-Ft. Reels of Super 8mm. Film, supra; see* 47 U.S.C. § 303(m)(1)(D). Clearly the winning lottery number is, on Thursday afternoon, press information protected by the first amendment.

Is the FCC, then, an exempt agency? To put the question conversely, does the circumstance that broadcasters are licensees of the federally owned broadcast frequencies make them, in the news context, subject to prior governmental restraints?

We can set to one side those cases dealing with a broadcaster's commercial activities. We assume for present purposes that Congress may constitutionally condition the grant of a license to use the federally owned broadcast frequencies upon an agreement by the licensees that they will disclose payments for broadcast information, 47 U.S.C. § 317, and that they will not, by the use of those frequencies, derive revenue from promotion of products or activities deemed by Congress unworthy of such promotion. *See Banzhaf* v. *FCC,* 405 F.2d 1082, 1101–03 (D.C. Cir. 1968), *cert. denied,* 396 U.S. 842 (1969); 15 U.S.C. §§ 1331–39; *cf. Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376 (1973). We assume, as well, that Congress may condition the grant of exclusive licenses to use the limited available number of broadcast frequencies upon reasonable agreements by the licensees designed to assure fair access of competing ideas to those frequencies. *See* 47 U.S.C. § 315; *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969); *National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943). *Compare with Columbia Broadcasting System, Inc.* v. *Democratic*

National Committee, 412 U.S. 94 (1973). This case, however, falls in neither category. Jersey Cape Broadcasting Corporation seeks no more than to include in its regular news broadcasts on Thursday a news item of immediate, though transitory, interest to 2,750,000 persons. If Congress may condition the grant of a license upon submission to prior restraint against broadcast of this news item, how would one distinguish a condition imposing a prior restraint on the broadcast of stock market or commodity future prices, or indeed of any subject matter? We think it clear from 47 U.S.C. § 326 that in enacting the Communications Act of 1934 Congress, while exercising its plenary power to license use of broadcast frequencies, did not claim, directly or by implication, any power to impose conditions on the grant of such licenses which would violate the first amendment. The FCC interpretation of 18 U.S.C. § 1304 gives that provision of the Communications Act of 1934 undue weight while giving too little weight to the Congressional expression in the same statute set out in 47 U.S.C. § 326. The latter provision negates any intention on the part of Congress to make 18 U.S.C. § 1304 applicable to news broadcasts. A logical reconciliation of the two sections, and one which avoids a serious constitutional difficulty, restricts the application of 18 U.S.C. § 1304 to promotion of lotteries for which the licensee receives compensation. *But cf. New York State Broadcasters Association* v. *United States, supra.* Possibly, as Judge Feinberg suggests in *New York State Broadcasters,* some uncompensated promotional announcements outside the context of broadcast journalism might be found by the FCC to be promotional, and not news, and hence prohibited by 18 U.S.C. § 1304. We need not decide that issue in this case. The

announcements here involved are unadulterated broadcast journalism—news—and clearly are protected by 47 U.S.C. § 326 and the first amendment rather than prohibited by 18 U.S.C. § 1304.

The petition for review will be granted and the ruling of the FCC will be reversed.

A True Copy.

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

United States Court of Appeals for the Third Circuit

No. 72–1878

Official File—Litigation Division Office of General Counsel

NEW JERSEY STATE LOTTERY COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

COMMONWEALTH OF PENNSYLVANIA, INTERVENOR

STATE OF NEW HAMPSHIRE, INTERVENOR

On Petition for Review of an Order of the Federal Communications Commission

Present: SEITZ, Chief Judge and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, and GARTH, Circuit Judges

JUDGMENT ON REHEARING

This cause came on to be heard on the certified list in lieu of the record from the Federal Communications Commission and was argued by counsel and later submitted en banc.

On consideration whereof, it is now here ordered and adjudged by this Court that the petition for review be, and the same is hereby granted and the

order of the Commission, filed July 27, 1972, be, and the same is hereby reversed. Costs taxed in favor of petitioner.

Attest:

THOMAS F. QUINN,
Clerk.

JANUARY 2, 1974.

F.C.C. 72-702

APPENDIX C

Before the Federal Communications Commission,
Washington, D.C. 20554

In the Matter of

JERSEY CAPE BROADCASTING CORP.

MEMORANDUM OPINION AND ORDER

(Adopted July 26, 1972; Released July 27, 1972)

By the Commission: Commissioner Johnson concurring in the result; Commissioner Hooks not participating.

1. The Commission has before it the "Petition for Reconsideration" filed on August 18, 1971, by George F. Kugler, Jr., the Attorney General of New Jersey, in behalf of the New Jersey State Lottery Commission, and that of Joseph J. Maraziti, State Senator of Morris County, New Jersey, and Carl E. Erickson, Alderman of Dover, New Jersey, filed jointly on August 20, 1971.[1] Also before us for consideration is additional material consisting of a supporting brief and a request for oral argument furnished by the New Jersey State Lottery Commission on October 6, 1971,

[1] The joint petition also appended copies of several letters urging review from New Jersey members of the U.S. Senate and House of Representatives.

to supplement the information contained in the original petition.[2]

2. Petitioners are requesting the Commission to reconsider the declaratory ruling, released on July 20, 1971, 30 FCC 2d 794, in the Matter of Jersey Cape Broadcasting Corporation, in which we indicated that the proposed broadcasts of the winning number in the New Jersey State Lottery would violate 18 U.S.C. § 1304 and the Commission's regulations which prohibit the broadcasting of "* * * any advertisement of or information concerning any lottery * * *."[3] In order to clarify this ruling, the Commission released a subsequent Public Notice on July 27, 1971 (36 Fed. Reg. 14347 (1971)) which stated, among other things, that the winning number may not be broadcast as part of a news item.

3. The ruling petitioners seek to reverse was given in response to the request of Jersey Cape Broadcasting Corporation, (hereinafter Jersey Cape), licensee of

[2] The Commission has received several letters in this matter and all of these have been taken into consideration in our action here.

[3] 18 U.S.C. § 1304 reads as follows:

"Broadcasting lottery information."

"Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or operating any such station knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes shall be fined not more than $1,000 or imprisoned not more than one year or both. Each day's broadcasting shall constitute a separate offense."

The applicable Commission rules (Section 73.122(AM), 73.292 (FM) and 73.656(TV)) essentially repeat the statute. They were recited in our previous ruling and need not be reiterated.

stations WCMC–AM–FM–TV, Wildwood, New Jersey, for a ruling that broadcasting of the winning state lottery number would not violate Section 1304 and the Commission's rules. Jersey Cape has not petitioned for reconsideration and the petitioners were not parties to the original request. However, it is clear from the matters stated in their respective petitions for reconsideration that they had no opportunity to intervene and that they are sufficiently aggrieved and adversely affected by the ruling, within the meaning of Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, and Section 1.106(b) of the Commission's rules, 47 CFR 1.106(b).

4. Jersey Cape's request proposed the following announcement for broadcast: "The winning state lottery number drawn today is (and then recite the winning number)." No further comment was to accompany the statement. The broadcasts were to take place on the day of the drawing and during three consecutive regular newscasts to commence at 12:00 noon shortly after the winning number had been drawn. The Commission recognized that the information to be broadcast had "some limited news value." Nevertheless, we decided that broadcasting it would violate the Federal lottery statute and the Commission's rules because to do so would directly promote a lottery. The decision was based primarily upon the guidance provided in the Commission's *Supplemental Declaratory Ruling* released March 2, 1970, 21 FCC 2d 846.

5. In the pleadings presently before us, the petitioner (New Jersey State Lottery Commission) makes basically the same argument as Jersey Cape made initially to the Commission, i.e., that the proposed broadcasts are legitimate news items concerning a lottery that only incidentally promote the lottery, and that therefore they are not prohibited by the Federal lot-

tery statute and the Commission's rules. Petitioner (New Jersey State Lottery Commission) relies upon the same authorities cited in the Commission's ruling but comes to a different result in applying them to the proposed broadcasts. The other petitioners (State Senator Maraziti and Alderman Erickson) principally contend that the proposed announcements "cannot be categorized" as information promoting a lottery. They are treated separately in this opinion since they present different reasons to support their position.

6. *The New Jersey State Lottery Commission:* Petitioner is the executive agency established by the New Jersey Legislature to administer the State Lottery Law. In seeking reconsideration, petitioner argues (as Jersey Cape did) that the "prime effect" of broadcasting the winning lottery number is to inform the public of a bona fide news item in which they are greatly interested, and that only incidentally is there any promotion of the lottery. Like Jersey Cape, petitioner contends that the case of *New York State Broadcasters Association, Inc.* v. *United States of America,* 414 F.2d 990 (2nd Cir. 1969), *cert. den.* 396 U.S. 1061 (1970) supports its position inasmuch as the case holds that 18 U.S.C. § 1304 prohibits only program materials which "directly promote a lottery" while permitting the broadcast of a bona fide news story even though such news may have an "incidental effect" of promoting a lottery.

7. In addition, petitioner cites in its behalf certain language contained in the *Supplemental Declaratory Ruling, infra,* p. 847, stating that the Federal statute "would appear not to bar news reports broadcast in normal good faith coverage which are reasonably related to the audience's right and desire to be informed

of the day-to-day happenings within the community."[4] Petitioner points out further that under Item 1 of the same ruling the Commission has authorized ". . . legitimate news stories appropriate to broadcasting," and has given as the reason for barring other news articles the fact that ". . . such time consuming listings are not ordinary broadcast journalism" (p. 848).[5]

8. Petitioner provides us with considerably more factual documentation than Jersey Cape did about the operation and importance of the State lottery, and contends that the various precedents permitting broadcasting of bona fide news items about lotteries should be examined against this factual background.[6] Peti-

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[4] Petitioner acknowledges that this language appeared initially in the September 25, 1968 declaratory ruling concerning the New York State Lottery, 14 FCC 2d 707, which was set aside by the Court in the *New York State* case. Petitioner states, however, that we have never repudiated this general construction of the statute.

[5] Petitioner also notes that under Item 3 of the *Supplemental Declaratory Ruling* an exception has been made for an explanation about how profits from the lottery will be distributed if the announcement is "part of the licensee's good faith effort to inform the public" and is not accompanied by other news directly promoting the lottery.

[6] For example, petitioner indicates that it has retained a professional advertising and public relations firm (Bofinger-Kaplan) to handle practically all direct promotional activities of the lottery, and states: "It would be fair to conclude, therefore, that all information which may validly be categorized as promotional is necessarily attributable to Bofinger-Kaplan, whereas all information which may validly be categorized as news may be attributable to other sources as well as to Bofinger-Kaplan." With this in mind, petitioner inisits it is very significant that the announcement of the winning number is not supplied to the communications media by the advertising agency. Petitioner notes that the independent wire services obtain the number by

tioner then makes the following points: No plea to buy tickets or other promotional information concerning the lottery would be included in the announcements of the winning number. The announcements would not be comparable to the promotional material prepared by the advertising agency. They would be "news" and the stations would simply be reporting what the wire services had decided was newsworthy. The public demands this information and thus it is to be regarded as "news reports broadcast in normal good faith coverage which are reasonably related to the audience's right and desire to be informed of the day-to-day happenings within the community." The wire services do not report specific promotional material prepared by the advertising agency and thus ". . . there could hardly be a better practical determinant of 'normal good faith coverage' of news than the contents of a wire service teletype, for the wire services report 'news' and not 'direct and exhortative' promotional material." The announcements "would be entirely appropriate to ordinary broadcast journalism," and they would be even less "time consuming" than broadcasting information on the time, weather, traffic, stocks and sports.

9. Moreover, petitioner indicates that the broadcast of the winning number should be considered in connection with the Commission's standards for determining a "bona fide news-type program" contained in FCC 70–871, "Use of Broadcast Facilities by Candidates for Public Office," 35 Fed. Reg. 13048 (1970).

10. Petitioner submits that the Commission has made an "unfortunate assumption" in stating that

telephoning the Lottery Commission and that Jersey Cape obtained the information from a news service teletype prepared by the wire services.

the proposed announcements would be of interest to a "limited class of people" and therefore that they would be of "limited news value." Petitioner contends the broadcast of the winning number is of "significant news value" and that the statistical documentation showing the large numbers of interested people participating in the lottery should provide us with an adequate ground for reconsideration. Petitioner also stresses the impossibility of its contacting the winner[7] and notes that publicizing the winning number is a "mechanical task" not requiring the assistance of its advertising firm. In view of this, petitioner submits the following proposition:

> In other words, promotion is the publicizing of that information which the Lottery Commission wants to convey in order to raise revenue by selling tickets, and news is the dissemination of that information which the public demands to know.

11. Lastly, petitioner contends that a "news" item may not be banned because the Commission considers it "reasonably necessary or helpful to the conduct of the lottery" (30 FCC 2d 795). Petitioner submits that under such a test, we should bar information giving the World Series, Super Bowl and horse racing results, since broadcasting this information is also "reasonably necessary or helpful" to the conduct of certain lotteries.

12. It is clear from the foregoing that petitioner is taking essentially the same position as Jersey Cape did although considerably more factual evidence and

[7] Until the purchaser files a claim based on his ticket number, the Lottery Commission is not able to determine the winner. It keeps no records of names and addresses of lottery ticket purchasers.

legal arguments have been presented. However, we do not believe that petitioner has correctly interpreted the precedents in this area, and as we have stated, at 30 FCC 2d 795, in the ruling which is the subject of petitioner's request here:

> * * * The *New York State* case does not, in our view, support Jersey Cape's position. While the Court recognized, at 414 F.2d 998, the distinction between information directly promoting a lottery (prohibited by 18 U.S.C. § 1304) and information which is simply "news" of a lottery (not prohibited), it did not define "direct promotion of a lottery." Accordingly, for specific guidance to broadcasters, it remanded the case to the Commission to apply its expertise to the problem.

We adhere to our view that the question here can be adequately answered from the guidance provided by the Commission in the *Supplemental Declaratory Ruling*. That ruling specifically indicates that the Commission regards such items as "[a]nnouncements (unpaid) of the places where lottery tickets may be purchased, where, how, and when winning tickets will be drawn, the amount of prizes, and how the proceeds of the sales of lottery tickets are and will be distributed" as items having only limited news value that directly promote a lottery. We continue to believe that the broadcast of the winning number in the State lottery is in this same category.[8]

13. We are not persuaded by petitioner's reasoning, based upon the specific situation in New Jersey, as

[8] In the *New York State* case at page 998, the Court expressly recognized that a "news" item having only an "incidental effect of promoting a lottery" is permissible. On the other hand, the Court cautioned that a lottery advertisement or announcement containing "'news' such as the amount a lottery realized for education . . . would nonetheless be banned."

to why the broadcast of the winning number should fall within the explanation of permissible broadcasting of bona fide news concerning lotteries described in the *New York State* case and in the *Supplemental Declaratory Ruling*. Even assuming that petitioner is correct in attributing most direct promotional activities to its advertising agency, we do not think it necessarily follows that information received by a broadcaster from an independent source, such as the wire services, is therefore to be regarded as a legitimate news story appropriate for broadcasting within the meaning of Items 1 and 3 of the *Supplemental Declaratory Ruling*.[9] Nor does the fact that the wire service treat the information as newsworthy automatically make it "news" for purposes of the lottery statute. The public demand may be "truly staggering" but it cannot change the law to permit the broadcast of information directly promoting a lottery. We would point out that the length of a news item is not the only factor the Commission considers in deciding whether a news item is "ordinary broadcast journalism" and that brevity alone is not enough to authorize an announcement giving information about a lottery. Moreover, weather reports, stock reports and the like are permissible not because of their short duration but because there is no Federal policy or statute designed to inhibit their broadcast by denying access to facilities over which the Federal Government has control.

14. Further, the Commission's standards contained in FCC 70–871, "Use of Broadcast Facilities by Candidates for Public Office," *supra*, are concerned with

[9] Petitioner does not assert that the advertising agency never engages in news dissemination activities. However, its brief states that "[n]either petitioner nor Bofinger-Kaplan issues news releases of any kind to broadcasting media."

the "equal opportunities" doctrine relating to the use of broadcasting facilities by legally qualified candidates for public office and have no bearing on determining whether a piece of information is a bona fide news item outside the prohibitions of the lottery law and regulations.

15. We also believe petitioner's arguments indicate some misunderstanding of the Commission's statement in *Jersey Cape* in which it was said that the proposed broadcasts do "not concern announcements of persons who have won" but instead would be devoted to "publicizing" the "winning number," and that the "widespread dissemination of such information" is "reasonably necessary or helpful to the conduct of the lottery and of interest only to that limited class of people who actually hold tickets." That language was intended to give the reasons why we think the proposed broadcasts would violate the basic prohibition of the statute against the broadcast of material which directly promotes a lottery. The purpose of explaining that the broadcast of the winning number would not present information about the persons who have won was to distinguish this kind of limited news item from items of general interest such as human interest stories about the winners which are expressly permitted under Item 6 of the *Supplemental Declaratory Ruling*.[10] The reference to a "limited class of people who actu-

[10] In that ruling, the Commission found permissible the broadcast of "Interviews with persons holding winning lottery tickets, relating, among other matters of general interest, to the number of tickets they purchased, their expectation of winning a prize, their reactions upon learning that they held winning tickets, and what they did or intend to do with the prize money." The Commission stated that "Such interviews are permissible as part of the licensee's good faith judgment as to information serving the interests of its area."

ally hold tickets" was meant to emphasize that even information of some news value to some persons is prohibited if its broadcast would directly promote a lottery." We think petitioner's admission that it needs to announce the winning number over the air because it does not have the information necessary to determine the identity of the winner merely serves to reinforce the finding that the broadcasts of the winning number would directly promote the lottery, or as we said in *Jersey Cape,* that the "widespread dissemination" of this information is "reasonably necessary or helpful to the conduct of the lottery." As for petitioner's suggestion that we should not permit the broadcast of the results of the World Series, Super Bowl, or horse races because information about them is "reasonably necessary or helpful to the conduct of the lottery," it is apparent that these are independent sporting events of legitimate interest to the viewing public and that such broadcasts are not being utilized as a means of publicizing the names of prize winners.

16. Petitioner also seeks an opportunity for oral argument before the Commission. However, in considering this request we have determined that the facts and the law are clear. The Court has decided in the *New York State* case that the lottery prohibitions are applicable to a legal state-operated lottery. Regardless of the public demand for this information and regardless of the need for wider publication of the winning

[11] In this connection, it is pertinent to note that the Court in the *New York State* case specifically rejected an argument that all advertisements concerning the State lottery may not be banned because they convey information on "matters of highest public interest and concern." The Court stated as follows: "To the extent that information of public interest and concern was to be conveyed, it was wholly incidental and subordinate to the promotion and thus properly prohibited." (P. 998).

lottery number, the Commission cannot relax the prohibitions of the Federal statute. The issue is for Congress not the Commission to resolve and we believe no useful purpose would be served by scheduling oral argument.

17. Joseph J. Maraziti and Carl E. Erickson: In their joint petition, they contend that announcing a winning lottery number is not comparable to prohibited announcements (unpaid) regarding locations where lottery tickets will be sold, the conditions under which the drawing will take place, the amounts of prizes, and how the proceeds of the lottery will be distributed. They base their argument upon the theory that 18 U.S.C. § 1304 prohibits the broadcasting of future events about a lottery that can be said to promote a lottery. They point out that announcing the winning number concerns a past event and that no one hearing such an announcement would be encouraged "to run out and buy a ticket or increase his normal purchase by hearing this report." They also maintain that announcing the winning number is indistinguishable from the broadcast of "top prize winners" which they say is recognized in our ruling as protected by the First Amendment. As a specific example of a permissible announcement they give the following and argue that if its broadcast is allowed, it is the same thing as an announcement that "the winning number was 123456":

> [T]he winning lottery ticket was drawn at the Cherry Hill Shopping Mall by Miss America, surrounded by the Governor and other State and Local officials. The top prize winner was John Doe.

They further note that broadcasting the winning number should not be regarded as a " 'scoop' which enhances interest in the lottery" because the lottery

ticket distributors post it immediately after the drawing and the press reports the winner a few hours later.

18. We find no support for petitioners' construction of the lottery statute in the decisions of the courts interpreting the statute. We recognize that the statute is to be narrowly construed because of first amendment considerations; however, the only judicial opinion specifically interpreting the "information concerning" language of the statute is the *New York State* case wherein the Court held that the test for determining whether material is prohibited by the statute is whether it "directly promotes a particular existing lottery," *supra,* p. 997. It should also be noted that the statute itself expressly prohibits a "list of the prizes drawn or awarded" which is, of course, information concerning a past event.

19. In addition, we think petitioners are incorrect in assuming that their example of a news item would be suitable for broadcast. As pointed out previously in this opinion, news matters of general interest about the winners would not violate the statute. However, the example given would not appear to contain information of the type described under Item 6 of the *Supplemental Declaratory Ruling.* (See paragraph 15 and footnote 10, *supra.*) As for petitioners' argument that the proposed broadcasts of the winning number would not encourage participants to do anything more to improve their chances of winning, we submit that petitioners have overlooked the stimulation such announcements would have in arousing and maintaining interest in the lottery as well as the importance to the Lottery Commission of communicating this information in order to assure the participants that they will not lose out on the big prize because of inadequate notification procedures.

20. We recognize the anomalous situation where the several states have enacted state lottery legislation and in accordance therewith are operating constitutional State lotteries and, in an effort to bring the lottery to the attention of their citizens, desire to utilize the broadcast media. We also note that this situation has been recognized by the Congress in its consideration of pending legislation concerning this subject. Nonetheless, until the present lottery statute is amended or qualified in any way, the Commission has no alternative but to apply the requirements of that statute.[12]

21. Accordingly, IT IS ORDERED, that the request for oral argument filed by the New Jersey State Lottery Commission, IS DENIED.

IT IS FURTHER ORDERED, THAT the petitions for reconsideration filed by the New Jersey State Lottery Commission and by State Senator Joseph J. Maraziti and by Alderman Carl E. Erickson, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

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[12] The lottery prohibition is a criminal statute in Title 18 of the U.S. Code and, as the Supreme Court held in *Federal Communications Commission* v. *American Broadcasting Company, Inc.*, 347 U.S. 284 (1954), the authority of the Commission with respect to its application is concurrent with that of the Department of Justice. In view of this, Commission action in this area is coordinated with the Department of Justice, and this procedure has been followed with respect to this proceeding.

U.S. GOVERNMENT PRINTING OFFICE: 1974

Supreme Court, U.S.
FILED
JUL 22 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1471

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS,

v.

NEW JERSEY STATE LOTTERY COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED APRIL 2, 1974
CERTIORARI GRANTED MAY 20, 1974

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1471

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS,

v.

NEW JERSEY STATE LOTTERY COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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*Not reprinted in Joint Appendix. Citations are to appendix of Petition for Writ of Certiorari.

Docket Entries

DATE 1972	FILINGS—PROCEEDINGS	Filed

Sep. 25—Petition for Review of an Order of the Federal Communications Commission, rec'd, filed (6) copies
Affidavit of service of above petition, filed.
Copy of Petition for Review mailed to Secretary of F.C.C.
Copy of Petition for Review mailed to Attorney General of the United States.

Oct. 5—Appearance of Richard M. Conley, Esq. for petitioner New Jersey State Lottery Commission, filed.

Oct. 6—Appearance of Joseph A. Marino, Esq. for respondent F.C.C., filed.

Oct. 10—Appearance of Howard E. Shapiro, Esq. for respondent United States, filed.

Oct. 11—Appearance of Charles M. Firestone, Esq. for respondent F.C.C., filed.

Oct. 11—Appearance of John W. Pettit, Esq. for respondent F.C.C., filed.

Oct. 24—Motion by Commonwealth of Pennsylvania for leave to intervene, filed. (4 cc.). Certificate of service attached.

Oct. 24—Motion by the State of New Hampshire for leave to intervene, filed. (4 cc.) Certificate of service in motion.

Nov. 6—Certified list in lieu of the entire record, rec'd. and filed. (2 copies).

Nov. 6—Motion by the State of New York for leave to intervene, filed. (4 copies). Certificate of service attached.

Nov. 10—Motion by State of New York for leave to file motion for leave to intervene out of time, filed. (4 cc.). Certificate of service attached.

Nov. 13—Submitted on motion by Commonwealth of Pennsylvania and motion by State of New Hampshire for leave to intervene. Coram: Aldisert, Gibbons and Hunter.

Nov. 13—Opposition by respondent, F.C.C., to motions for leave to intervene by the State of New Hampshire, Commonwealth of Penna. and State of New York, filed. (4 cc.) Certificate of service attached.

Nov. 15—Order (*Aldisert,* Gibbons and Hunter) granting motions by Commonwealth of Pennsylvania and State of New Hampshire for leave to intervene, filed.

Nov. 15—Appearance of David H. Souter, Esq. for intervenor, State of New Hampshire, filed.

Nov. 22—Appearance of Raymond Keiman, Esq. for intervenor, Commonwealth of Pennsylvania, Bureau of State Lotteries, filed.

Nov. 27—Reply of The State of New York to Opposition by respondent, Federal Communications Commission, to motion to intervene, received (4 cc.) Certificate of service attached.

Nov. 27—Submitted on motions by The State of New York for leave to intervene and for leave to file a motion for leave to intervene out of time. Coram: McLaughlin and Adams.

Dec. 4—Order (*McLaughlin* and Adams) denying motions by the State of New York for leave to intervene and for leave to file a motion to intervene out of time, filed.

Dec. 4—CC of above order to C of D.C.

Dec. 15—Consent motion by petitioner, with affidavit in support, for leave to extend time for filing brief and appendix to and including January 15, 1973, filed. (4 cc.). Proof of service in letter dated December 14, 1972.

Dec. 21—Above consent motion granted. NO FURTHER EXTENSIONS. *Clerk.*

Dec. 18—Motion by intervenor, Commonwealth of Pennsylvania, for leave to extend time for filing brief to January 15, 1973, filed. (4 cc.). Affidavit of service attached.

Dec. 27—Submitted on above motion by intervenor. *Clerk.*

DATE 1973	FILINGS—PROCEEDINGS	Filed

Jan. 3—Order (Clerk) granting motion by Intervenor, Commonwealth of Pennsylvania, for leave to extend time to file brief to January 15, 1973, filed.

Jan. 12—Brief for Intervenor, Commonwealth of Pennsylvania, filed. Certificate of service by mail on January 11, 1973, attached.

Jan. 15—Appendix, rec'd. and filed.

Jan. 15—Affidavit of service of appendix by mail on January 12, 1973, filed.

Jan. 15—Brief for petitioner (New Jersey State Lottery Commission, rec'd January 17, 1973, filed. (25 cc.). Affidavit of service by mail on January 15, 1973 attached to brief.

Jan. 13—Statement of intervenor, the State of New Hampshire, concurring in the positions taken by New Jersey in that brief, and believes no purpose would be served by New Hampshire's filing a further brief; therefore New Hampshire submits this statement in lieu of brief, filed. (25 copies). Certificate of service attached.

Jan. 17—Motion by The Maryland Public Broadcasting Commission for leave to file brief as amicus curiae, filed. (4 copies). Consent of counsel for all parties attached.

Jan. 15—Brief as amicus curiae of the Maryland Public Broadcasting Commission, in support of the position of the petitioner, filed. Certificate of service by mail on Jan. 15, 1973 attached.

Mar. 5—Motion by respondent, Federal Communications Commission, for leave to file brief out of time, filed. (4 copies). Certificate of service attached.

Mar. 9—Motion by petitioner for acceleration of oral argument on appeal, in which it states that counsel for respondents have indicated that they do not intend to oppose this motion, filed. (4 cc.) Proof of mailing in letter dated March 7, 1973.

Mar. 13—Submitted on above motion. CLERK

Mar. 13—Order (CLERK) granting motion by respondent, Federal Communications Commission, for leave to file brief out of time, filed.

Mar. 13—Brief for respondent, Federal Communications Commission, rec'd. March 5, 1973, filed.

Mar. 13—Certificate of service of respondent's brief by mail on March 1, 1973, filed.

Mar. 20—Submitted on above motion. Clerk.

Mar. 21—Order (CLERK) granting petitioner's motion for acceleration of oral argument on appeal and this case will be listed for disposition on the merits at the earliest convenience of the Court, filed.

May 3—Letter dated May 3, 1973 enclosing opinion and order of the F.C.C. concerning New York City's Off-Track Betting Corp., received for the information of the Court from Alfred L. Nardelli, Esq. (4 cc.). Certificate of service attached.

May 15—Argued. Coram: Van Dusen, Gibbons and Rosenn.

Sept. 18—Order (Seitz, Van Dusen, Aldisert, Adams, *Gibbons,* Rosenn, Hunter, Weis and Garth, C. J.) that the Clerk of this Court list the above case for rehearing before the court en banc at the convenience of the Court, filed.

Oct. 4—Order dated October 3, 1973 (Seitz, J.) directing case be listed for rehearing en banc without oral argument, filed.

Nov. 15—ReSubmitted en banc. Coram: Seitz, Chief Judge and Van Dusen, Aldisert, Adams, Gibbons, Rosenn, Hunter, Weis and Garth, Circuit Judges.

DATE 1974	FILINGS—PROCEEDINGS	Filed

Jan. 2—Opinion of the Court (Seitz, Chief Judge and Van Dusen, Aldisert, Adams, *Gibbons,* Rosenn, Hunter, Weis and Garth, Circuit Judges), filed.

Jan. 2—Judgment granting the petition for review; reversing the order of the Commission, filed July 27, 1972, with costs taxed in favor of petitioner, filed.

Jan. 14—Bill of costs for petitioner, filed. service in letter of 1/11/74

Jan. 17—Motion by respondent for Stay of Mandate, filed.

Jan. 21—Order (Gibbons, Circuit Judge) staying the issuance of the mandate until February 15, 1974, filed.

Jan. 24—Motion by petitioner for reconsideration and Vacation of order staying mandate, and Brief in Support thereof, rec'd, filed. (10 copies) service attached.

Feb. 1—Order (Seitz, Chief Judge and Van Dusen, Aldisert, Adams, *Gibbons,* Rosenn, Hunter Weis and Garth, Circuit Judges) denying motion by petitioner for reconsideration and vacation of order staying mandate, filed.

Feb. 19—Certified judgment in lieu of formal mandate issued.

Feb. 19—Record released to secretary of F.C.C.

Mar. 1—Receipt for release of record rec'd from Secretary of F.C.C., filed.

Apr. 5—Notice of filing (on April 2, 1974) of petition for writ of certiorari, rec'd from Clerk of S.C., filed. (S.C. No. 73-1471).

Jun 5—Certified copy of order dated May 28, 1974 rec'd from Clerk of the Supreme Court granting the petition for writ of certiorari, filed. (S.C. No. 73-1471)

Request for Declaratory Ruling Respecting New Jersey State Lottery, filed by Jersey Cape Broadcasting Corp., Dated February 18, 1971

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February 18, 1971

RECEIVED
Feb 18, 1971
F.C.C.

Office of the Secretary

THE HONORABLE BEN F. WAPLE, Secretary
Federal Communications Commission
Washington, D.C.

Jersey Cape Broadcasting Corporation
Station WCMC-AM-FM-TV
Wildwood, New Jersey

Request for Declaratory Ruling
Respecting New Jersey State Lottery

Sir:

Request is hereby made on behalf of the licensee of Stations WCMC-AM-FM-TV, Wildwood, New Jersey for a declaratory ruling by the commission as to whether or not

the announcement of the winning number of the state lottery, each week, would constitute a violation of 18 USC § 1304, or Commission Rules or policies, respecting lotteries.

The facts are these. On Thursday morning, each week, a representative of the state of New Jersey draws one multi-digited number as the winning lottery number for the week. The person having the exact number wins the grand prize; other persons having some of the digits win lesser prizes. Approximately 11:30 A.M. each Thursday Stations WCMC-AM-FM-TV are advised of the winning number via its Associated Press teletype machine.

It has become known to area residents that the station does become aware of the winning number shortly after it is drawn, and, each Thursday the station is bombarded with scores of telephone calls by residents requesting the winning number. The licensee understands that area newspapers and state agencies are bombarded with telephone inquiries, also. All have attempted to discourage such calls. The newspapers in the area publish the winning number, but not until late afternoon or the next morning.

It is proposed that Station WCMC-AM-FM-TV be permitted during regular newscasts to broadcast the following statement:

> "The winning state lottery number drawn today is (and then recite the winning number)."

There would be no further comment whatever either during that newscast or thereafter. It is proposed that the station broadcast the winning number on three consecutive newscasts commencing at 12:00 noon on Thursday, only.

It is respectfully submitted that the proposed broadcasts would not constitute a lottery. The United States Court of Appeals for the Second Circuit, in the New York State Broadcasters Association, Inc. v. United States of America, 414 F2d 990 held that 18 U.S.C § 1304 prohibited, only, information that "directly promote a lottery," but that a bona fide news story is not barred despite the fact that the news has an "incidental effect" of promoting a lottery.

In the above set of circumstances it is submitted that the prime effect of the broadcast would be to inform the listening public of a legitimate news item about which they have a keen interest, and, that only "incidently" is there any promotion of a lottery. To permit such broadcasts on the one hand would inform the public and on the other hand eliminate scores of telephone calls to local news agencies and government officials, which considering all the circumstances would be consistent with the laws of the United States and would serve the public interest, convenience, and necessary.

Very truly yours,

LEONARD S. JOYCE
Leonard S. Joyce
Counsel for Jersey Cape
Broadcasting Corporation

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

FCC 71-722

63861

In the Matter of
Jersey Cape Broadcasting
Corporation

Declaratory Ruling

Adopted: July 14, 1971; Released: July 20, 1971

By the Commission: Commissioners Robert E. Lee and Wells absent; Commissioner Johnson concurring in the result.

1. This matter concerns a request for declaratory ruling filed February 18, 1971, by Jersey Cape Broadcasting Corporation (hereinafter Jersey Cape), licensee of Stations WCMC-AM-FM-TV, Wildwood, New Jersey, with respect to the following described situation:

> Jersey Cape is desirous of broadcasting weekly on its above stations, the winning New Jersey state lottery number. Each Thursday morning, a state official draws one multi-digited number as the winning New Jersey state lottery number for the week. Although local newspapers publish the winning number, such publications are not available generally until late afternoon or the next morning. The winning number is received by Jersey Cape's stations at approximately 11:30 a.m. each Thursday on a news service teletype. Jersey Cape states that area residents have become aware of the station's early receipt of the winning number, and that "each Thursday the station is bombarded with scores of telephone calls by residents requesting the winning number." Jersey Cape "understands that area newspapers and state agencies are deluged by similar telephone inquiries, also."

2. Jersey Cape proposes to alleviate the above situation by broadcasting each Thursday only, during three consecutive regular newscasts commencing at 12:00 noon, the following statement:

"The winning state lottery number drawn today is (and then recite the winning number)."

No further comment would accompany the statement.

3. Jersey Cape submits that broadcasting the above recited statement would not constitute a violation of 18 U.S.C. § 1304[1] or of the Commission's Rules respecting lotteries.[2] It asserts that the case of *New York State*

---

[1] 18 U.S.C. § 1304 reads as follows:

Broadcasting lottery information.

Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or operating any such station knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes shall be fined not more than $1,000 or imprisoned not more than one year or both. Each day's broadcasting shall constitute a separate offense.

[2] The applicable Commission Rules, Section 73.122 (AM), 73.292 (FM) and 73.656 (TV), are patterned after the statute.

Broadcasters Association, Inc. v. *United States of America*, 414 F.2d 990 (2nd Cir. 1969), supports its position by holding that 18 U.S.C. § 1304 prohibits only program materials which "directly promote a lottery," but that a bona fide news story is not barred despite the news having an "incidental effect" of promoting a lottery. Jersey Cape contends that in the present situation, "the prime effect of the broadcast would be to inform the listening public of a legitimate news item about which they have a keen interest, and that only incidentally is there any promotion of a lottery."

4. *The New York State* case does not, in our view, support Jersey Cape's position. While the Court recognized, at 414 F.2d 998, the distinction between information directly promoting a lottery (prohibited by 18 U.S.C. § 1304) and information which is simply "news" of a lottery (not prohibited), it did not define "direct promotion of a lottery." Accordingly, for specific guidance to broadcasters, it remanded the case to the Commission to apply its expertise to the problem.

5. Subsequently, the Commission released, on March 2, 1970, a *Supplemental Declaratory Ruling*, 21 FCC 2d 846, which adequately serves as a basis for the response to the request now before us. Ten specific hypothetical situations were dealt with, and for each case a conclusion was reached as to whether broadcasts would be prohibited. It was there declared that although broadcasting legitimate news stories concerning lotteries is permitted, certain types of items, which may be said to interest some listeners and thus have some limited news value, do so directly promote a lottery as to be prohibited from being broadcast. Into this category were placed items, clearly comparable to the proposal before us, such as "Announcements (unpaid) of the places where lottery tickets may be purchased, where, how, and when winning tickets will be drawn, the amount of prizes, and how the proceeds of the sales of lottery tickets are and will be distributed." Bona fide news announcements of the persons winning the top prizes, of interest to the public generally, are protected by the First Amendment, but not a long list of winners. The instant proposal does not concern announcements of persons who

have won but rather the publicizing of the "winning number," the widespread dissemination of such information being reasonably necessary or helpful to the conduct of the lottery,[3] and of interest only to that limited class of people who actually hold tickets.[4]

6. For these reasons, the proposed broadcast would be, in our view, a violation of 18 U.S.C. § 1304 and the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION
BEN F. WAPLE
Secretary

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[3] Some years ago, upon disclosure that the announcement of the daily U.S. Treasury balance was being used to establish and announce the winning number in the "numbers game," leading metropolitan newspapers immediately discontinued the printing of this figure.

[4] The lottery prohibition is a criminal statute in Title 18 of the U.S. Code and, as the Supreme Court held in *Federal Communications Commission* v. *American Broadcasting Company, Inc.*, 347 U.S. 284 (1954), the authority of the Commission with respect to its application is concurrent with that of the Department of Justice. In view of this, Commission action in this area is coordinated with the Department of Justice, and this procedure has been followed with respect to this proceeding.

Public Notice, Broadcast of Lottery Information. FCC 71-763, released July 27, 1971

PUBLIC NOTICE
Federal Communications Commission—1919 M Street, NW
Washington, D. C. 20554

FCC 71-763—66155
July 27, 1971—B

BROADCAST OF LOTTERY INFORMATION

It has been brought to the attention of the Commission that certain licensees and/or news services may be misinterpreting the declaratory ruling (FCC 71-722) handed down by the Commission on July 14, 1971, which concerned the broadcast of the winning New Jersey State lottery number.

The ruling was given in response to a request for a declaratory ruling made by Jersey Cape Broadcasting Corporation in which it was stated that the winning numbers would be announced on news programs. The Commission stated that such broadcasting of winning New Jersey State lottery numbers was prohibited by 18 U.S.C. § 1304 and Commission regulations.

The Commission noted that the proposed broadcast of the winning lottery numbers was of interest only to that limited class of persons who actually hold tickets and did not have the general news interest of announcements of the names of persons who have won.

The Commission's ruling appears to have been interpreted in some quarters as holding that winning numbers may be broadcast if they are given as part of a news item. All licensees and other interested persons should note that this is not a correct interpretation of the ruling, and that the Commission considers such announcement of winning lottery numbers to be prohibited by the statute and its rules.

Action by the Commission July 23, 1971. Commissioners Bartley, Robert E. Lee, Johnson and H. Rex Lee.

Petition for Reconsideration of Declaratory Ruling, FCC 71-722, and Covering Letter, Dated August 16, 1971, Filed By Attorney General, State of New Jersey

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By: Philip I. Kagan
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609/292-6567

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of Jersey)
Cape Broadcasting Corporation)

Petitioner, New Jersey Lottery Commission, by way of a Petition for Re-Consideration says:

1. On February 18, 1971, Jersey Cape Broadcasting Corporation, an FCC licensee, WCMC-AM-FM TV, requested a declaratory ruling on whether a broadcast of a particular news item would be violative of 18 U.S.C. § 1304 and Commission's Rules. The item is as follows:

> "The winning state lottery number drawn today is (and recite the winning number)."

2. On July 20, 1971 the Commission released a declaratory ruling, FCC 71-722, 63861, concluding that the proposed broadcast would be in violation of 18 U.S.C. § 1304 and the Commission's Rules.

3. This petitioner was not a party to the original request by Jersey Cape Broadcasting Corporation. It had no opportunity to intervene therein as it had no notice or knowledge of said request.

4. Had this petitioner been a party to the original request, certain statistical surveys would have been made available to the Commission. Said surveys show that on a weekly basis approximately *2.75* million people pur-

chase New Jersey State Lottery tickets within the State of New Jersey. This class represents approximately *58%* of the adult population of the State of New Jersey (N.J. S.A. 5:9-15 prohibits the sale of lottery tickets to anyone under the age of 18 years). As such, this major segment of the population is vitally interested in the proposed news item.

5. The conclusion of the Commission that the proposed news item is of interest to a "limited class of people" and therefore of limited news value is erroneous because of the above.

6. The proposed news item is of significant news value and if it promotes the New Jersey State Lottery, it does so in an incidental manner.

7. The effect of the aforementioned ruling it to preclude the petitioner from communicating a legitimate news item to a major segment of the citizens of the State of New Jersey through the broadcasting news media.

8. Therefore, this petitioner is aggrieved and adversely affected within the meaning of 47 U.S.C. § 405 by the aforementioned declaratory ruling.

9. The original ruling by reason of the erroneous conclusion is in violation of rights guaranteed by the Constitution of the United States and contrary to the holding of the court in the case of *N. Y. Broadcasters Assn., Inc.* v. *U. S. of America,* 414 F.2d 990 (2nd Cir. 1969).

Wherefore:

The petitioner respectfully requests a re-consideration of the aforementioned ruling in order to present to the Commission its factual evidence and legal arguments.

Respectfully submitted,

GEORGE F. KUGLER, JR.
Attorney General of New Jersey

By: PHILIP I. KAGAN
Philip I. Kagan
Deputy Attorney General

SUPREME COURT OF THE UNITED STATES

No. 73-1471

UNITED STATES, ET AL., *Petitioners,*

v.

NEW JERSEY STATE LOTTERY COMMISSION

Order Allowing Certiorari

Filed May 28, 1974

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE 1974—552-423/P. O. 297

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1471

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

v.

NEW JERSEY STATE LOTTERY COMMISSION,

Respondent.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

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NEW JERSEY STATE LOTTERY COMMISSION,

Respondent.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ARGUMENT

The Court should grant the petition for writ of certiorari to resolve the continuing uncertainty of the Federal Communications Commission concerning the applicability of the lottery provision of the Federal Communications Act (18 U.S.C. §1304) to the broadcasting as part of regularly scheduled news shows of winning numbers in a legal state lottery.

The primary issue in this case is whether Congress, by including a provision in the Communications Act of 1934

(48 Stat., ch. 652, 18 U.S.C. §1304) prohibiting the broadcasting of advertisements or information concerning any lottery, intended to interefere with the normal freedom of the broadcast news media to include in regular news broadcasts information concerning legal lotteries which they have determined the public has an interest in knowing.

Section 1304 prohibits the broadcasting of "any advertisement or information concerning any lottery." Obviously, it would be inappropriate to interpret the word "information" in §1304 literally to prohibit any broadcast communication pertaining to lotteries. Otherwise, even an editorial condemning lotteries or a human interest story concerning a winner would be barred. Rather, the word "information" should be read in light of its association with "advertisement". As the Court noted in *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307 (1961):

> "The maxim *noscitur a sociis,* that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the acts of Congress."

It is most appropriate to apply this rule in the instant case in light of the strict construction which has been accorded the parallel provisions of 18 U.S.C. §1302, the absence of any indication that Congress in including this provision in the Communications Act of 1934 intended to impose any restriction on news broadcasting, the fact that the statute is penal in nature, and the serious First Amendment problems raised by any attempt to censor news broadcasting.

When §1304 is read in this light, it is reasonable to limit the term "information" to direct promotional activity.

The word "advertising" alone could be construed to apply only to promotional activity for which compensation is paid to the broadcaster. It has long been common, however, for lotteries to be operated by charitable organizations such as churches, volunteer fire departments and hospitals. Such organizations are frequently able to announce their activities in the broadcast media without the payment of any compensation to the broadcaster. Since these public interest announcements might not be found to be "advertisements," it is reasonable to infer that Congress added the word "information" to clearly indicate that all direct promotional activity concerning a lottery, not just what is technically "advertising," would be prohibited.

There is a substantial difference between promotional activity on behalf of the operator of a lottery which is not technically "advertising" and the broadcasting of news about a lottery which is included on regular news shows in response to public interest in the information. The news function of the communications media has always enjoyed a preferred position because it touches so closely on First Amendment freedoms. *New York Times Company* v. *United States,* 403 U. S. 713 (1971). Indeed, Congress itself included an express provision in the Communications Act directing the F.C.C. to respect First Amendment values. 47 U.S.C. §326. Therefore, if it had intended 18 U.S.C. §1304 to impose restrictions on regular news broadcasting, Congress would have expressed this intention in clear and unequivocal language.

The broadcasting on the day of the drawing of the winning number drawn by the New Jersey Lottery as part of three regularly scheduled news shows constitutes "news" about the lottery. The broadcast of the winning lottery number is undeniably a report of a current event of public interest. The form and content of the program is that of the straight newscast. Furthermore, the program is ini-

tiated, produced and controlled by the station, which makes the editorial judgment that the broadcast of winning lottery numbers is newsworthy. Therefore, the Third Circuit *en banc* correctly held that:

> ". . . [t]he announcements here involved are unadulterated broadcast journalism—news—and clearly are protected by 47 U.S.C. §326 and the first amendment rather than prohibited by 18 U.S.C. §1304." (App. 9a-10a).

Although the unanimous opinion of the Third Circuit sitting *en banc* thus correctly interpreted §1304 as not having been intended to prohibit the broadcasting of winning lottery numbers as part of regular news broadcasts, there are several reasons why it would be appropriate for the Court to grant certiorari.

First, the F.C.C. takes the position in its petition that the decision of the Third Circuit in this case is inconsistent with *New York State Broadcasters Association* v. *United States,* 414 F. 2d 990 (2nd Cir. 1969), and that there is, therefore, a conflict in the circuits. Although the State of New Jersey disagrees with this view, the fact that the F.C.C. takes the position that there is a conflict in the circuits suggests that it will not adhere to the decision of the Third Circuit in its regulation of the broadcast news media outside of the circuit. At a minimum, the uncertainty created by this alleged conflict undoubtedly will lead many broadcasters to refrain from broadcasting winning lottery numbers, even though they would conclude in the exercise of their uninhibited editorial judgment that there was sufficient public interest in winning lottery numbers to include them as part of regular news broadcasts. This continuing inhibition upon the exercise of the broadcast news media's judgment as to what is newsworthy is of concern to the

State of New Jersey and its citizens, because most of the news broadcasts into the northern sections of the State originate outside of the Third Circuit in New York City. It would appear, therefore, that only a final resolution by the Court of the issues presented by this case will afford the citizens of the State of New Jersey a full opportunity to hear news concerning the New Jersey State Lottery.

Secondly, the extent of the federal government's constitutional authority to prohibit the broadcast news media from broadcasting news about legal state lotteries is a question of broad public significance. There are now eight states which operate lotteries which have been duly authorized by legislation and/or constitutional amendment in those states. There is also strong public interest in lotteries in the states which operate them. Therefore, the states have a significant interest in finally establishing the extent of the federal government's power to restrict the flow of information concerning legal state lotteries.

CONCLUSION

It is respectfully submitted for the foregoing reasons that the Court should grant the petition for writ of certiorari.

Respectfully submitted,

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Respondent, New Jersey State Lottery Commission
By: STEPHEN SKILLMAN
Assistant Attorney General

STEPHEN SKILLMAN
Assistant Attorney General
Of Counsel and On the Brief

Supreme Court, U. S.
FILED
AUG 19 1974
MICHAEL RODAK, JR., CLERK

No. 73-1471

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

NEW JERSEY STATE LOTTERY COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1471

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

NEW JERSEY STATE LOTTERY COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–10a) is reported at 491 F. 2d 219. The Commission's memorandum opinion and order on reconsideration (Pet. App. 13a–26a) are reported at 36 FCC 2d 93. The Commission's original decision (App. 8–11) is reported at 30 FCC 2d 794.

JURISDICTION

The judgment of the court of appeals was entered on January 2, 1974 (Pet. App. 11a). A petition for a writ of certiorari was filed on April 2, 1974 and granted on May 28, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the prohibition in 18 U.S.C. 1304 against the broadcast of "any * * * information concerning any lottery" or of "any list of the prizes drawn or awarded by means of any such lottery" applies to the announcement during newscasts of the winning number in the New Jersey State Lottery, and is constitutional as so applied.

STATUTES INVOLVED

18 U.S.C. 1304 provides:

> Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.
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> * * * * *

47 U.S.C. 326 provides:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio comunication.

47 U.S.C. 312 provides:

> (a) The Commission may revoke any station license or construction permit—
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> * * * * *
>
> (6) for violation of section 1304, 1343, or 1464 of Title 18.
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> * * * * *

47 U.S.C. 503 provides:

> * * * * *
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> (b)(1) Any licensee or permittee of a broadcast station who—
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> * * * * *
>
> (E) violates section 1304, 1343, or 1464 of Title 18,
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> shall forfeit to the United States a sum not to exceed $1,000. Each day during which such violation occurs shall constitute a separate offense. Such forfeiture shall be in addition to any other penalty provided by this chapter.
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> * * * * *

STATEMENT

This case arises on a petition for review of the Federal Communications Commission's determination that weekly broadcasts of the winning number in the New Jersey State Lottery would violate the federal statutory prohibition against the broadcast of "any advertisement of or information concerning any lottery * * *, or any list of the prizes drawn or awarded by means of any such lottery * * *." 18 U.S.C. 1304. The FCC reasoned that the broadcast of the winning number was not essentially a news item of general interest, but, rather, the "dissemination of * * * information * * * reasonably necessary or helpful to the con-

duct of the lottery, and of interest only to that limited class of people who actually hold tickets (App. 10–11). That ruling followed the Second Circuit's previous holding that Section 1304 "prohibits * * * so-called news that directly promotes the Lottery, *e.g.*, broadcasting lists of winners." *New York State Broadcasters Ass'n* v. *United States*, 414 F. 2d 990, 999, certiorari denied, 396 U.S. 1061.

However, on review of the Commission's declaratory ruling, the Third Circuit held that the announcements of the winning number would constitute "unadulterated broadcast journalism—news—and clearly are protected by 47 U.S.C. § 326 [which prohibits censorship by the FCC] and the first amendment rather than prohibited by 18 U.S.C. § 1304" (Pet App. 10a).

1. GENERAL BACKGROUND

Congress first acted in 1827 to deny use of federally regulated communications systems for lottery purposes by prohibiting postmasters from serving as agents for lottery offices and from receiving "lottery schemes, circulars or tickets" free of postage (Act of March 2, 1827, Section 6, 4 Stat. 238). By 1868 the prohibition had been extended to the mailing of "any letters or circulars concerning lotteries" (Act of July 27, 1868, Section 13, 15 Stat. 196). Four years later, Congress passed legislation prohibiting the mailing of letters or circulars concerning illegal lotteries, but the word "illegal" was shortly thereafter stricken (Act of June 8, 1872, Section 149, 17 Stat. 302;

and Act of July 12, 1876, Section 2, 19 Stat. 90). Postal prohibitions were further expanded in 1890 to include newspapers containing "any advertisement of any lottery" (Act of September 19, 1890, Section 1, 26 Stat. 465). Similarly, increasing numbers of state legislatures prohibited lotteries; the last authorized nineteenth century lottery was outlawed in Louisiana in 1893.

The congressional policy of denying lotteries access to federally regulated channels of communications and commerce was continued with respect to the new communications medium of radio. When the Communications Act of 1934 was adopted, Section 316, 48 Stat. 1088, prohibited the broadcast of "any advertisement of or information concerning any lottery". Section 316 was subsequently recodified with editorial changes as 18 U.S.C. 1304.[1]

Congressional and state views towards lotteries coincided into the 1950's. By 1952, 37 states had anti-lottery provisions in their constitutions, and all states had anti-lottery laws. Recently, however, at least eight states have enacted legislation creating authorized

[1] Related provisions of Title 18 include: Section 1301 which prohibits the importing or transporting of lottery tickets; Section 1302 which prohibits the mailing of lottery tickets or related matter; Section 1303 which prohibits the postmaster or employees from acting as a lottery agent; Section 1305 which creates a special exemption for non-profit fishing contests; and Section 1306 which prohibits financial institutions from selling lottery tickets for state-operated lotteries.

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state lotteries.[2] But Congress has not altered its basic policy. In 1967 it prohibited federally financed lending institutions from serving as agents for authorized state lotteries. 18 U.S.C. 1306. As the Second Circuit recently observed:

> Congress long ago stopped differentiating between legal and illegal lotteries, see 15 Op. Att'y Gen. 203–04 (1877); *Commerford* v. *Thompson*, 1 F. 417, 421 (C. C. Ky. 1880); *cf. United States* v. *Fabrizio*, 385 U.S. 263, 87 S. Ct. 457, 17 L. Ed. 2d 351 (1966); and as recently as 1967 enacted a law to prevent federally insured banks and savings institutions from selling lottery tickets for state operated lotteries. See 18 U.S.C. § 1306. There can thus be no doubt that Congress intended to prohibit broadcast of lottery information regardless of the legality of the lottery under local law. [*New York State Broadcasters Ass'n* v. *United States*, 414 F. 2d 990, 996, certiorari denied, 396 U.S. 1061.]

Since that decision, several bills have been introduced before Congress which would exempt state operated lotteries from the proscriptions of 18 U.S.C. 1304. See H.R. 1485, H.R. 1991, H.R. 3503, H.R. 3806, H.R. 5875, H.R. 6454, H.R. 6536, and H.R. 6668, 93d Cong., 1st sess. However, to date none has been adopted.

[2] New York (L. 1973, ch. 346, § 19; McKinney's Consolidated Laws of New York Ann., Unconsolidated Laws, § 9541 *et seq.*), New Jersey (L. 1970, ch. 13; New Jersey Stat. Ann., 5:9–1 *et seq.*), Pennsylvania (72 Purdon's Penna. Stat. Ann., § 3761–1 *et seq.*), Michigan (13 Mich. Stat. Ann., § 18.969(1) *et seq.*), Massachusetts (1971 Laws, 813, § 2; Ann. Laws of Mass., ch. 10, § 22 *et seq.*), Maryland (L. 1972, ch. 365, § 1; Ann. Code Md., Art. 88D, § 1 *et seq.*), Connecticut (Conn. Gen. Stat. Ann., § 12–567 *et seq.*), and New Hampshire (N. H. Rev. Stat. Ann., 284:21–a *et seq.*) now have authorized lotteries.

2. THE SECOND CIRCUIT'S CONSTRUCTION OF 18 U.S.C. 1304

Since 1969 the FCC has been guided by the Second Circuit's decision in *New York State Broadcasters supra*, the first construction of the meaning of Section 1304's prohibition against the broadcast of "any advertisement of or information concerning" a lottery. The court observed that "[i]n prohibiting the broadcasting of lottery information Congress was not acting in a vacuum; for more than one hundred years a prohibition on conducting a lottery by use of the mail facilities had existed." 414 F.2d at 995.

In the court's view, "[t]he real point here is that we are not primarily in the realm of ideas at all but are chiefly concerned with speech closely allied with the putting into effect of prohibited conduct." 414 F.2d at 997.

Contentions that Section 1304 unconstitutionally inhibited "lawful communication unconnected with the operating of a lottery" were rejected since neither the court nor the Commission believed that Section 1304 should be literally read to prohibit absolutely all "information concerning a lottery":

> The section obviously prohibits a licensed broadcaster from conducting a lottery on the air. But that prohibition alone would be almost meaningless; by its very nature, a lottery could be promoted by broadcasting information about it with essentially the same effect as conducting

> it. It is certainly reasonable that Congress acted to prohibit this possibility—the broadcasting of advertisements and information that directly promotes a particular lottery—and we think that the section must be strictly construed to go no further. [414 F.2d at 997.]

As thus interpreted to preclude broadcasts only of information directly promoting a lottery, the court of appeals held, "section 1304 neither improperly restricts broadcasters to an official government view nor inhibits the free expression of ideas by reason of its overbreadth." 414 F.2d at 997.

In sum, the Second Circuit recognized a distinction between news about a lottery and information which was closely allied with the putting into effect of prohibited conduct—"so-called news that directly promotes the lottery."

3. THE PRESENT CONTROVERSY: FCC RULING

In 1971, Jersey Cape Broadcasting Corp., the licensee of broadcast stations WCMC–AM–FM–TV in New Jersey, sought a declaratory ruling from the FCC as to whether the broadcast of the winning lottery number in the New Jersey State Lottery would constitute a violation of 18 U.S.C. 1304. Its stations had been "bombarded with scores of telephone calls by residents requesting the winning number" because listeners were aware that its Associated Press teletype machines carried the weekly winning lottery number shortly after the drawing (App. 7). To remedy this problem, Jersey Cape proposed to broadcast during

three consecutive newscasts on the day of the lottery drawing the following statement (*ibid*):

> The winning state lottery number drawn today is (and then recite the winning number).

In its opinion, such broadcasts would not directly promote the lottery but rather "inform the listening public of a legitimate news item about which they have a keen interest," and, only "incidentally," would there be any promotion of a lottery (App. 8).

The Commission analyzed Jersey Cape's petition in light of the *New York State Broadcasters* decision and the FCC's previous declaratory rulings on remand.[3] It noted that the Second Circuit had drawn a "distinction between information directly promoting a lottery (prohibited by 18 U.S.C. § 1304) and information which is simply 'news' of a lottery (not prohibited)" (App. 10). Here, the Commission concluded, "[t]he instant proposal does not concern announcements of persons who have won but rather the publicizing of the 'winning number,' the widespread dissemination of such information being reasonably necessary or helpful to the conduct of the lottery, and of interest only to that limited class of people who actually hold tickets" (App. 10–11). Accordingly, a declaratory ruling was issued to the effect that the proposed broadcast would be illegal.

The New Jersey State Lottery Commission sought reconsideration of the decision, arguing that the "'prime effect' of broadcasting the winning lottery number is to inform the public of a bona fide news item in which they are greatly interested, and that

[3] *Lotteries*, 21 FCC 2d 846.

only incidentally is there any promotion of the lottery" (Pet. App. 16a).

The FCC reaffirmed its *Jersey Cape* ruling, stating (Pet. App. 23a):

> We think petitioner's admission that it needs to announce the winning number over the air because it does not have the information necessary to determine the identity of the winner merely serves to reinforce the finding that the broadcasts of the winning number would directly promote the lottery, or as we said in *Jersey Cape,* that the "widespread dissemination" of this information is "reasonably necessary or helpful to the conduct of the lottery."

4. THE THIRD CIRCUIT'S OPINION

In reversing the FCC's ruling, the Third Circuit criticized the agency for taking insufficient account of 47 U.S.C. 326, which denies it any "power of censorship over * * * radio communications" and enjoins it from "interfer[ing] with the right of free speech by means of radio communication." In the court's view (Pet. App. 9a):

> A logical reconciliation of [18 U.S.C. 1304 and 47 U.S.C. 326], and one which avoids a serious constitutional difficulty, restricts the application of 18 U.S.C. § 1304 to promotion of lotteries for which the licensee receives compensation.[4]

[4] In an aside, the court noted, without deciding, that "[p]ossibly * * * some uncompensated promotional announcements outside the context of broadcast journalism might be * * * prohibited by 18 U.S.C. § 1304" (Pet. App. 9a).

Applying this construction, the court held that "it is beyond the competency of any governmental agency to determine, *a priori,* that any item of information is, for any news medium, not news" (Pet. App. 7a). The Third Circuit easily concluded that "[t]he announcements here involved are unadulterated broadcast journalism—news—and clearly are protected by 47 U.S.C. § 326 and the first amendment rather than prohibited by 18 U.S.C. § 1304" (Pet. App. 9a–10a).

SUMMARY OF ARGUMENT

1. Congress intended 18 U.S.C. 1304 to ban announcements such as those in the instant case. It focused explicitly on the distinction between "advertisement" and "information" concerning lotteries, and chose to ban both. It also intended to reach legal as well as illegal lotteries. Finally, with the possible exception of procedural limitations not relevant here, the anti-censorship provisions of 47 U.S.C. 326 were not meant to erect any higher barrier to broadcast regulation than already imposed by the First Amendment.

2. Broadcasting may be regulated in the public interest, and that regulation may extend beyond what would be permissible in a non-licensed medium. In any event, it is ultimately the character of the material transmitted which removes the proposed broadcast from the scope of the First Amendment. The announcement of winning lottery numbers is an integral part of the operation of a suppressible activity. It is not an expression of ideas about any subject, nor does it promote any of the values the First Amendment is designed to protect. The FCC has properly protected such values in holding that documentaries, editorial

comment and other aspects of public discourse of lotteries must be permitted. Its reasonable judgment that the mere recital of a series of digits (having no meaning apart from their role in carrying out the lottery) is not protected should be upheld.

ARGUMENT

There can be no serious doubt that, read straightforwardly, Section 1304 of Title 18 bans the broadcast of a winning lottery number. Whether or not it amounts to communicating a "list of the prizes drawn or awarded by" a lottery, it plainly involves the dissemination of "information concerning [a] lottery." Those unqualified words of the statute, on their face, apparently embrace any broadcast of winning numbers, whatever the purpose or context: no exception is made for a communication of such information when it is unsponsored or is included in a "news" program.

So much, we suppose, is conceded on all sides. The argument is, rather, that Section 1304 cannot be construed literally because to do so would (1) contravene the restrictive legislative intent disclosed in the anti-censorship provisions of 47 U.S.C. 326; and (2) at all events, would offend the Free Speech Clause of the First Amendment. We consider those two objections in turn.

A. LEGISLATIVE INTENT

1. We may quickly dispose of any suggestion that the inclusion of the words "information concerning" in the statutory ban on lottery broadcasts was a slip of the legislative pen. The history of the provision forecloses that contention.

Section 1304 originated as part of a House Bill of 1932 (H.R. 7716, 72d Cong., 1st Sess.), proposing several amendments to the Radio Act of 1927. Among these was a new prohibition (Section 13 of the bill) on the broadcast of "any information concerning any lottery." H. Rep. No. 221, 72d Cong., 1st Sess., p. 7. There was no discussion of the breadth of the ban in the first committee report or during the initial debates on the House floor. See *id.* at 8; 75 Cong. Rec. 3683, 3704. When the bill reached the Senate, however, it was noticed that the proposed radio provision prohibiting the communication of any lottery "information" was wider than the existing statutes affecting the interstate transportation or mailing of newspapers, which only barred "advertisements." See 18 U.S.C. 1301–1302. Accordingly, the Senate rewrote the provision to prohibit only "any advertisement of any lottery." See 76 Cong. Rec. 3767. The committee reports explain that this was done so as to place "radio stations on the same basis as newspapers in connection with broadcasting information as to lotteries." S. Rep. No. 564, 72d Cong., 1st Sess., p. 10; S. Rep. No. 1004, 72d Cong., 2d Sess., p. 12; S. Rep. No. 1045, 72d Cong., 2d Sess., p. 11.

We thus have an express indication that at least one branch of Congress focused on the difference between the two terms "information" and "advertisement." But the story does not end there. When the amended bill returned to the House, it declined to acquiesce in the narrowed Senate version, and the Senate in turn insisted on its amendments. See 76 Cong. Rec. 3915, 3933–3934. The bill went to conference and the

upshot was the present text, including a prohibition on the broadcast of both "any advertisement of" and "any information concerning" a lottery. See H. Rep. No. 2106, 72d Sess., 2d Sess., p. 6; 76 Cong. Rec. 5204. Although the bill failed of enactment because it was pocket-vetoed by President Hoover (see 76 Cong. Rec. 5397), the identical provision became law two years later as Section 316 of the Communications Act of 1934, without further debate. Against this background, it is fair to conclude that the all-embracing prohibition of lottery information broadcasts was the product of a deliberate congressional decision.

2. It may be suggested, however, that Section 1304 was intended to reach only *illegal* lotteries, and is therefore improperly invoked here. Such a contention would be premised on the fact that when the provision was written (1932) and first enacted (1934) lotteries were illegal everywhere in the country. The premise is correct, but the conclusion does not follow.

Unquestionably, those who wrote Section 1304 characterized lotteries as "unlawful practices" (see H. Rep. No. 221, 72d Cong. 1st Sess., p. 8; S. Rep. No. 1004, 72d Cong., 2d Sess., p. 12; S. Rep. No. 1045, 72d Cong., 2d Sess., p. 11), condemned by the laws of all the States (see 75 Cong. Rec. 3683, 3704). No doubt, that consideration removed any hesitation to erect an absolute ban on the broadcast of lottery information. Indeed, it reinforces our submission that the provision should be construed literally. It is not, however, a sufficient reason to conclude that Congress meant to exempt legal lotteries. Even if we had no indication of the legislative attitude, we should be

controlled by the words of the statute—which makes no such exception—not by a guess as to what Congress might have done in a situation not then presented.

But, as it happens, we have strong evidence that no exemption for legal lotteries would have been made. As we have detailed in the Statement, *supra,* pp. 4–6, there had been, for more than half a century, a continuous congressional policy of denying access to federally regulated channels of communications to all lotteries, whether legal or illegal. And see *United States* v. *Fabrizio,* 385 U.S. 263, 267–269. Moreover, as already noted, Congress expressly stated its desire to place broadcasters on the same footing as newspapers with respect to the dissemination of lottery information, and there is no doubt that the ban on publishers reached legal lotteries. *In re Rapier,* 143 U.S. 110; *Ex Parte Jackson,* 96 U.S. 727. Finally, it is instructive that recent efforts to win legislative exemption for state operated lotteries have all failed. See Statement, *supra,* pp. 6–7.

In the absence of any constitutional inhibition (see *infra,* pp. 17–24), the natural inference is that, in enacting Section 1304, Congress was merely extending to the new medium of radio the same hostile attitude toward all lotteries, whether legal or illegal under State law. Until and unless the statute is amended, we must therefore read it as it is written: a general ban on the broadcast of *all* lottery information, subject only to constitutional limitations.

3. It remains to deal with the suggestion that Section 1304 does not mean what it says when read together with 47 U.S.C. 326. That provision, so much

relied upon by the Third Circuit, denies the Federal Communications Commission "the power of censorship over * * * radio communications" and enjoins it from "interfer[ing] with the right of free speech."

The basic flaw in this argument, in light of the legislative history previously recounted, is that Section 1304 postdates the anti-censorship provision. Indeed, what is now Section 326 of Title 47 is carried over unchanged from the Radio Act of 1927 (where it appeared as Section 29, 44 Stat. 1172), and, as we have seen, the lottery broadcast ban was first sponsored in 1932 and not enacted until 1934. Hence, if one provision is deemed to qualify the other, we must treat Section 1304, the later enactment, as controlling.

The fact is, however, that Congress viewed the two provisions as entirely consistent. This is indicated by their appearance on the same page of the House and Senate reports recommending the enactment of the Communications Act of 1934, in which the anti-lottery provision is Section 316 and the anti-censorship provision is Section 326. See S. Rep. No. 781, 73d Cong., 2d Sess., p. 8; H. Rep. No. 1918, 73d Cong., 1st Sess., p. 49. Evidently, with the possible exception of a procedural prohibition (not relevant here) on any censorship activity by the Commission,[5] Section 326 was then thought to announce no more than the obvious caveat that the First Amendment must not be transgressed.

[5] This Court has stated that "the Commission would be remiss in its duties if it failed *in the exercise of its licensing authority*, to aid in implementing [Section 1304], *either by general rule or by individual decisions.*" *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, 289 (emphasis added; footnote omitted).

And, so far as we are aware, until this case, that has been the prevailing view. See, *e.g., Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367, 382, 389–390; *Columbia Broadcasting* v. *Democratic Comm.,* 412 U.S. 94, 109–110.

At all events, there is no basis here for construing 47 U.S.C. 326 as erecting any higher barrier than the First Amendment. The Commission's ruling in this case does not approach a claim to "the power of censorship over radio communications." It merely recognizes that there is a flat statutory ban on the broadcast of winning lottery numbers, no different in kind than the absolute statutory prohibition on cigarette advertising which this Court has sustained. *Capital Broadcasting Co.* v. *Acting Attorney General,* 405 U.S. 1000, affirming 333 F. Supp. 582 (D.D.C.). If the present ruling contravenes Section 326, it must be because it "interfere[s] with the right of free speech" guaranteed by the First Amendment.

The upshot is that, at least for purposes of this case, Section 1304 reaches to the Constitutional boundary. Except insofar as the First Amendment stands in the way, the statute must be read to prohibit the broadcast of any lottery information, including the disclosure of winning numbers. The case turns, then, on the constitutional question, to which we now address ourselves.

B. CONSTITUTIONALITY

1. There is, of course, no blinking the existence of a potential constitutional issue whenever the freedom to broadcast is circumscribed by government. At the same time, however, it is well settled that the First

Amendment shields broadcasters more narrowly than publishers. See *Red Lion Broadcasting Co.* v. *Federal Communications Commission, supra,* 395 U.S. at 386–390, and cases there cited. One aspect of this difference is illustrated by the contrasting decisions of the Court condoning the imposition of a right-of-reply rule on broadcasters on the one hand (*Red Lion, supra*) and condemning the attempt to enforce a comparable rule against publishers on the other (*Miami Herald Publishing Co.* v. *Tornillo,* No. 73–797, decided June 25, 1974). But more directly relevant to our case is the express statement in *Pittsburgh Press Co.* v. *Human Rel. Comm'n,* 413 U.S. 376, 387, that the decision sustaining the ban on the broadcast of cigarette advertisements (*Capital Broadcasting, supra*) was "not dispositive" of the First Amendment challenge to a legislative prohibition affecting advertisements in a newspaper "[b]ecause of the peculiar characteristics of the electronic media."

It may be that this distinction governs our case, whatever might be the result if a comparable ban were sought to be imposed directly on the press. The broadcaster is subject to more restrictive regulation in the public interest both because of the practical reality that access is necessarily limited (see *Nat. Broadcasting Co.* v. *United States,* 319 U.S. 190, 216–220, 226–227) and because, like the user of the United States mails, he is a mere licensee with respect to a national channel of communication (see, *e.g., In re Rapier,* 143 U.S. 110, 134–135). Within limits, the federal government accordingly has greater power, in-

deed often a duty, to prevent what it deems to be abuse of the broadcast license.

Presumably, these considerations informed the Court's ruling in *Capital Broadcasting, supra.* And it is difficult to appreciate why that decision, approving an absolute ban on the broadcast of advertisements promoting a lawful activity, is not controlling here. To be sure, the present case does not involve paid advertisements. But for reasons articulated below (*infra,* pp. 20–21), we suggest that is immaterial. Nor do we suppose the result in *Capital Broadcasting* would have been different if that case had involved a broadcaster who, for his own private or commercial reasons, had "plugged" cigarette sales without direct sponsorship in defiance of a statute prohibiting such conduct.

2. We do not, however, rest our submission entirely, or even principally, on "the peculiar characteristics of the electronic media." Without ignoring that consideration, we turn to more general principles which, in our view, control the case.

It is of course well settled that, consistently with the First Amendment, even newspapers can be absolutely forbidden to publish certain kinds of information. This is sufficiently illustrated by the Court's ruling in *Pittsburgh Press Co.* v. *Human Rel. Comm'n, supra,* and the examples given in the opinion, "a want ad proposing a sale of narcotics or soliciting prostitutes" (413 U.S. at 388). The same principle must obviously govern with respect to a state law banning advertisements for an illegal lottery—else the States could not effectively outlaw lotteries.

What, then, is the difference between those situations and the present case? Two apparent distinctions emerge: legality v. illegality, and "news" v. advertisement. We shall test each of these arguments in turn.

No doubt, as *Pittsburgh Press, supra,* suggests (413 U.S. at 388), there is less ground for concern when the speech suppressed promotes activity already declared illegal by law. But the illegality of the underlying conduct is neither a sufficient basis for ending the First Amendment inquiry nor does it define the boundary of governmental power. Indeed, no one, we suppose, would argue that discussion of sex discrimination in employment can be barred merely because the practice is unlawful. Nor, *per contra,* is it maintainable that a federal law which forbade broadcasts directly inciting such discriminatory conduct would run afoul of the First Amendment if no other law condemned sex discrimination in employment. Were the rule otherwise, many federal statutes which outlaw use of the mails or interstate communications in furtherance of activities deemed injurious to the public but not elsewhere made illegal would fall. The First Amendment requires no such absurd result. See, *e.g., Capital Broadcasting Co.* v. *Acting Attorney General, supra; Public Clearing House* v. *Coyne,* 194 U.S. 497; *Donaldson* v. *Read Magazine, Inc.,* 333 U.S. 178; *E. F. Drew & Co., Inc.* v. *Federal Trade Commission,* 235 F.2d 735 (C.A. 2), certiorari denied, 352 U.S. 969.

The only conclusion is that the constitutionality of legislation banning speech has little if anything to do

with the legality of the connected activity. The dividing line is elsewhere.

3. What, then, of the asserted distinction between "news" and advertisements? So stated, we submit this is not a sound basis for separating that governmental intrusion which offends the First Amendment and that which does not.

It is now settled that paid or sponsored information is not, for that reason alone, outside constitutional protection. *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 266; *Pittsburgh Press Co.* v. *Human Rel. Comm'n, supra,* 413 U.S. at 384–388. Nor does it matter whether, although the material is unsponsored, the publisher or broadcaster is activated by the profit motive of attracting a wider audience and thereby a larger circulation and advertisement income. See *Pittsburgh Press Co., supra,* 413 U.S. at 385. But the converse must be equally true: "commercial" or otherwise unprotected speech cannot gain First Amendment immunity merely because it is labelled "news". An editorial decision cannot of itself insulate material from otherwise legitimate governmental control. See *id.* at 386–388.

This, it seems to us, is the main source of the erroneous result reached below. The Third Circuit deemed itself precluded from questioning the broadcaster's characterization of the winning lottery number announcements as "news" (Pet. App. 7a) and accordingly concluded that they involved "unadulterated broadcast journalism" protected by the First Amendment (Pet. App. 10a). Nor is that finding confirmed, as the court below believed, by looking to

the size of the interested audience. Doubtless, in some communities more people would be attracted by information as to where narcotics are on sale than by a discussion of the Constitution. The potential audience for material, in this sense, is simply not the test of First Amendment protection.

4. In the final analysis, we suggest this case is controlled by the character of the material broadcast, the nature of the activity about which information is conveyed, and the proximity of the connection between the two. That is, in effect, the view espoused by the Second Circuit in *New York State Broadcasters Ass'n* v. *United States*, 414 F. 2d 990, certiorari denied, 396 U.S. 1061, which we submit should be followed here.

a. It is, of course, relevant that lotteries, although not everywhere unlawful, may be altogether suppressed. The situation may be quite different with respect to information relating to constitutionally protected rights. Cf. *Mills* v. *Alabama*, 384 U.S. 214. To be sure, the fact that the activity itself enjoys no constitutional immunity does not end the inquiry because the First Amendment protects some discussion of even illegal conduct. But it would make nonsense of constitutional law to hold that a government that wished to suppress lotteries—and was constitutionally free to do so—was powerless to act whenever the activity was conducted or promoted by speech. Thus, a State, or the United States with respect to the District of Columbia, must be able to ban words, written or spoken, in furtherance of a lottery. See, *e.g.*, *Giboney* v. *Empire Storage Co.*, 336

U.S. 490. It follows, *a fortiori*, that the federal government may constitutionally serve the same policy by closing the national airways to lottery promotion.

b. Given an activity which government may properly discourage or outlaw, the next question is whether the speech to be banned is promotional. Here, it seems to us, the test must be objective: labels cannot control. Nor is the issue resolved by the circumstance that the information is not directly sponsored or paid for by the operators of the lottery in this case. And, finally, it is irrelevant how large an audience is attracted. What matters is whether the communication must realistically be deemed an aspect of the activity sought to be controlled, or rather, a discussion or commentary upon it. For the First Amendment protects the exchange of "ideas" (*Red Lion*, *supra*, 395 U.S. at 390), "debate" (*New York Times* v. *Sullivan*, *supra*, 376 U.S. at 270), not mere words.

Thus, the FCC has held that documentories, editorial comment, panel discussions and interviews about lotteries are not prohibited, "even if the broadcast 'has the incidental effect of promoting a lottery' ". *Lotteries*, 21 FCC 2d 846. Here, on the other hand, the Commission has concluded that the announcement of winning lottery numbers, meaningless to all but the participants (in contrast to superficially similar announcements of such numbers as sports scores or market quotations), is effectively an ingredient of the lottery operation which is reached by Section 1304. That judgment, we submit, is entirely reasonable and ought not be disturbed.

c. We recognize that there may be other cases in which it is difficult to separate promotional speech

from idea communication once we apply Section 1304 to more than the pedestrian "commercial". Nevertheless, we urge the Court to repudiate the artifical line announced below. At least, in this case, it seems to us plain that the mechanical recitation of numbers, which merely promotes an unprotected activity without communicating any opinion or idea, or, indeed, conveying anything whatever to the general public, cannot enjoy the shield of the First Amendment. The Constitution has more important uses.

Accordingly, we submit as correct the Commission's ruling that Section 1304 does not overstep the constitutional boundary in prohibiting the broadcast of winning lottery numbers.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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IN THE

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OCTOBER TERM, 1974

No. 73-1471

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

v.

NEW JERSEY STATE LOTTERY COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

Counter-Statement of Questions Presented

1. Should the lottery provision of the Federal Communications Act (18 U.S.C. § 1304) be construed to prohibit news broadcasters from informing their listeners of

the winning numbers in a legal state lottery, even though the purpose of Congress in enacting the section was solely to prevent the advertisement or conduct of illegal lotteries through the airwaves?

2. Is an outright prohibition upon the broadcast as part of a regular news show of the winning numbers in a legal state lottery compatible with the free speech and free press guarantees of the First Amendment, in the absence of any indication that a public purpose is served by the prohibition?

Counter-Statement of the Case

On February 18, 1971, Jersey Cape Broadcasting Corporation (hereinafter "Jersey Cape"), the licensee of Stations WCMC-AM-FM-TV, Wildwood, New Jersey, filed a request with the Federal Communications Commission for a declaratory ruling on whether proposed broadcasts of the winning number in the New Jersey State Lottery would violate 18 U.S.C. § 1304, which prohibits the broadcasting of "any advertisement of or information concerning any lottery . . ." (App. 6-8). In a declaratory ruling issued July 14, 1971, the FCC held that the proposed broadcast would constitute a violation of 18 U.S.C. § 1304. 36 Fed. Reg. 13813 (1971) (App. 8-11).

The New Jersey State Lottery Commission then petitioned the FCC for reconsideration of its declaratory ruling on the ground that the Lottery Commission was adversely affected by the ruling within the meaning of 47 U.S.C. § 405 (App. 13-14). In a Memorandum Opinion and Order released July 27, 1972, the FCC adhered to its original interpretation of 18 U.S.C. § 1304 and denied the Lottery Commission's petition for reconsideration of the declaratory ruling (Pet. App. 12a to 26a).

On September 25, 1972, the Lottery Commission filed a petition for review of the order with the Court of Appeals for the Third Circuit which, on its own motion, submitted the appeal for determination en banc. In a unanimous opinion rendered on January 2, 1974, the court reversed the declaratory ruling of the FCC (Pet. App. 1a-10a) and held that ". . . [t]he announcements here involved are unadulterated broadcast journalism—news—and clearly are protected by 47 U.S.C. § 326 and the first amendment rather than prohibited by 18 U.S.C. § 1304." (Pet. App. 9a-10a).

The FCC petitioned for a writ of certiorari to review the Third Circuit's decision and, due to continuing uncertainties concerning the FCC's enforcement policies under Section 1304, the State of New Jersey also took the position that certiorari should be granted. On May 28, 1974 the Court granted the petition (App. 15).

At the general election held November 4, 1969, the voters of the State of New Jersey approved the adoption of an amendment to Article IV, Section VII, paragraph 2 of the New Jersey Constitution, adding subparagraph "C", as follows:

> "C. It shall be lawful for the Legislature to authorize the conduct of State lotteries restricted to the selling of rights to participate therein and the awarding of prizes by drawings when the entire net proceeds of any such lottery shall be for State institutions, State aid for education."

Subsequently, the "State Lottery Law," (N.J.S.A. 5:9-1, *et seq.*) was enacted by the New Jersey Legislature on February 16, 1970 to implement the constitutional amendment and the conduct of the New Jersey Lottery was commenced shortly thereafter.

In its original request to the FCC for a declaratory ruling Jersey Cape Broadcasting Corporation proposed the following program of broadcasting winning numbers in the New Jersey Lottery:

> "On Thursday morning, each week, a representative of the state of New Jersey draws one multi-digited number as the winning lottery number for the week. The person having the exact number wins the grand prize; other persons having some of the digits win lesser prizes. Approximately 11:30 A.M. each Thursday Stations WCMC-AM-FM-TV are advised of the winning number via its Associated Press Teletype machine.
>
> "It has become known to area residents that the station does become aware of the winning number shortly after it is drawn, and, each Thursday the station is bombarded with scores of telephone calls by residents requesting the winning number. The licensee understands that area newspapers and state agencies are bombarded with telephone inquiries, also. All have attempted to discourage such calls. The newspapers in the area publish the winning number, but not until late afternoon or the next morning.
>
> "It is proposed that Station WCMC-AM-FM-TV be permitted during regular newscasts to broadcast the following statement:
>
> 'The winning state lottery number drawn today is (and then recite the winning number).'
>
> There would be no further comment whatever either during that newscast or thereafter. It is proposed that the station broadcast the winning number on three consecutive newscasts commencing at 12:00 noon on Thursday, only." (App. 7).

In its petition for reconsideration of the FCC's adverse ruling the New Jersey Lottery Commission brought to the attention of the agency certain additional facts concerning the extent of public interest in receiving information about the lottery, summarized in the opinion of the Third Circuit:

> "The Lottery Commission claims that each Thursday it is confronted with a difficult problem in coping with the public demand for information of the winning number. Its telephone service was temporarily suspended on August 19, 1971, due to an overload of telephone calls. Records of the New Jersey Bell Telephone Company indicate that its twelve automatic answering and announcement machines in Newark, specially installed for the Lottery Commission to announce the winning numbers to callers in the northern half of New Jersey, receive an average of 5,500 calls between the hours of 9:30 a.m. and 2:30 p.m. on Thursdays. Five additional machines have been installed in Newark. In addition to the calls completed, 32,000 and 63,000 'overflow calls were attempted on August 12 and August 19, 1971, respectively. Many phone calls requesting the winning lottery number have also been made to newspapers throughout the state commencing at approximately 11:30 a.m. on Thursdays. On a typical Thursday, 2,750,000 ticketholders are interested in the winning number." (Pet. App. 3a-4a).

Summary of Argument

The legislative history of the Federal Communications Act of 1934 indicates that the lottery section (18 U.S.C. § 1304) was designed to prevent the airwaves from being used to advertise or to conduct lotteries which had been declared illegal by state law. Since there were no legal state lotteries in the 1930s, Congress could not have intended to prohibit the broadcast news media from announcing winning numbers in a legal state lottery in response to widespread public demand for that information. The fact that the lottery section provides criminal sanctions for violations and thus must be strictly construed further militates against interpreting it to apply to broadcasts which were beyond the contemplation of the Congress which enacted the law. Finally, if the lottery provision could be read to restrict the discretion of the broadcast news media in selecting material for regular news shows, it would infringe upon the free speech and free press guarantees of the First Amendment. Therefore, the lottery provision should be construed to apply solely to the commercial activity towards which it was directed at the time of enactment.

ARGUMENT

POINT I

The lottery provision of the Federal Communications Act (18 U.S.C. § 1304) was designed to prevent the advertisement or actual conduct of illegal lotteries through the airwaves, and therefore should not be construed to prohibit the broadcasting on a regular news show of winning numbers in a legal state lottery.

The initial issue on this appeal is whether the FCC has correctly construed 18 U.S.C. § 1304, enacted as part of the Communications Act of 1934 (48 Stat., ch. 652), as prohibiting the broadcast news media from announcing winning lottery numbers during regular news shows.

The provision eventually enacted as Section 1304 first appeared as House Bill 7716 of 1932. Designed to amend and supplement the Radio Act of 1927, this bill, including the lottery broadcast provision, passed both Houses of the 72nd Congress, but was pocket vetoed by the President and therefore never became law. The same section was included in Senate Bill 3285 of the 73rd Congress, which became the Federal Communications Act of 1934. Perhaps because the lottery provision was not new at the time of consideration of S 3285, there was no significant mention of it in the debates preceding the adoption of the Federal Communications Act. Rather, the only enlightening discussion of the intent of the section occurred during the deliberations on H.R. No. 7716 two years earlier.

The House debates on H.R. No. 7716 indicated that the essential purpose of the lottery provision was to prohibit either the advertisement or actual conduct of a lottery via the airwaves. Thus, Congressman Edwin F. Davis, the

sponsor of the bill, stated that the section ". . . forbids, in effect, conducting lotteries over radio stations. In other words, this section simply provides that the federal government, which has assumed the responsibility and obligation to regulate radio, shall not permit these stations, licensed by the Federal Government, to violate the laws of the United States and of every State in the Union." 75 Cong. Rec. 3683 (1932). Similarly, Congressman Lehlbach, who played a key role in the deliberations on the bill and later served on the Senate-House conference committee to reconcile differences in language with the Senate Bill, stated that the section ". . . prohibits the broadcasting or advertising of lotteries, to which the radio interests give their unqualified consent; and it is not in the sense of censorship that this provision is sought but because it is unfair, grossly unfair, to permit, in the event they should avail themselves of the absence of a prohibition, radio to advertise a lottery when, if a newspaper attempts to do the same thing, it is unmailable." 75 Cong. Rec. 3684 (1932).

When the bill reached the Senate, the Committee on Interstate Commerce changed the lottery provision to proscribe any "advertisement" instead of any "information concerning" a lottery. 76 Cong. Rec. 3767 (1933). The Committee report explained the change in language as follows:

> "The purpose of this new section is identical with the section passed by the House, but your committee believes the language of the new section more nearly places radio stations on the same basis as newspapers in connection with broadcasting information as to lotteries." Sen. Rep. No. 564, 72nd Cong., 1st Sess. (1932).

It thus appears that the Senate Committee changed the language of the lottery provision, not to narrow its scope

as asserted by the FCC, but rather as a technical revision to bring its language into conformity with that part of 18 U.S.C. § 1302 which prohibits the knowing use of the mail to send a newspaper containing "any advertisement" of a lottery. 76 Cong. Rec. 3764 (1933) (comments of Senator Dill).

The Senate Committee also changed the language of numerous other provisions of H.R. No. 7716 and, after the bill had been passed by the Senate, the House declined to acquiesce in the Senate amendments and asked for a conference. However, there is absolutely no indication in the legislative record that the difference in phraseology in the Senate and House versions of the lottery provision prompted the two Houses to ask for a conference. Therefore, the implication in the FCC's brief that a conference was called on H.R. No. 7716 because the members of the House thought the Senate version of the lottery provision to be significantly narrower than the House version is simply unfounded. On the contrary, the report of the House conference committee stated that "the amendment agreed upon is substantially the same as section 13 of the bill, involving some changes in phraseology." 76 Cong. Rec. 5037 (1933).

The above cited portions of the congressional debate clearly show that Congress neither discerned nor intended to draw a sharp distinction between proscriptions against "information concerning" and "advertisement of" any lottery. Although the representatives originally used the term "information", the debate indicates that the House's real concern was the prevention of the advertisement or conducting of a lottery over the air. The Senate amended the bill to say "advertisement" just to make that intention more explicit. The most likely explanation for the conference committee employing the disjunction, "advertisement of or other information concerning" a lottery, is that this

was the simplest way of reconciling the Senate and House versions of the lottery provision, which was neither a particularly controversial nor an important part of the bill. Therefore, the legislative history of the predecessor to the bill which became the Federal Communications Act of 1934 does not support the conclusion that the term "information concerning" a lottery was conceived to be significantly broader than a prohibition against advertising.

In the absence of legislative history to support the FCC's expansive interpretation of Section 1304, the Court should seek the intent of Congress in light of established principles of statutory interpretation.

It is firmly established that the intent of legislation is to be gathered from the nature of the subject matter and the overall object and policy of the statute. *Richards* v. *United States,* 369 U.S. 1, 11 (1962). It must be borne in mind that the subject of this case is a news broadcast concerning a legal state lottery, rather than the use of the airwaves to conduct an illegal lottery. It is true, as pointed out in the brief for the FCC, that the legislative history of 18 U.S.C. § 1302 seems to indicate that it was intended to apply to legal state lotteries, and that Section 1304 was patterned after Section 1302. However, the issue here is not whether legal state lotteries come within Section 1304. Rather, the point is that the evil at which Section 1304 was directed was illegal lotteries, and that the existence of legal state lotteries, which would be the focus of sufficiently widespread public interest to be the subject of news broadcasts, was simply not within Congress' contemplation. Indeed, if there had been any intimation that the section was intended to affect the freedom of broadcasters to determine what is news, rather than simply to prohibit the use of the airwaves to advertise or conduct lotteries which were already illegal under state law, one may be quite sure that the inclusion of this provision in the Communications

Act would have been bitterly opposed by broadcasters, instead of receiving their support. The FCC's efforts to regulate news broadcasting under its interpretation of Section 1304 thus extends the application of this section into an area which was obviously beyond the contemplation of Congress in the 1930s.

The FCC's position has also been developed without proper regard for the well established principle that penal statutes are to be strictly construed. *United States* v. *Bass,* 404 U. S. 336, 348 (1971); *Federal Commun. Com'n* v. *American Broad. Co.,* 347 U. S. 284, 296 (1954); *United States* v. *Halseth,* 342 U. S. 277, 280 (1952); *France* v. *United States,* 164 U. S. 676, 682-683 (1897). Although this case arises in the setting of the FCC's exercise of its regulatory responsibilities, violation of 18 U.S.C. § 1304 is a crime, punishable by a fine of not more than $1,000 and imprisonment of not more than one year, with each day's broadcasting constituting a separate offense. Therefore, the provision should be interpreted to avoid establishing criminal responsibility for conduct when there is absolutely no indication Congress considered that conduct to be criminal. Indeed, the Court has already followed precisely this approach in rejecting the FCC's view that Section 1304 prohibits television "give away" shows. *Federal Commun. Com'n* v. *American Broad. Co., supra.* As the Court properly noted in *United States* v. *Bass, supra*:

> "'[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.' . . . In various ways over the years, we have stated that 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'" • • • [B]e-

> cause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.' H. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks 196, 209 (1967)." 404 U. S. at 347-348.

This is a particularly appropriate setting for invoking this policy. It is clear that Section 1304 was intended to prevent the use of the airwaves as an instrumentality for conducting or assisting in conducting lotteries already illegal under state law. However, nothing could have been further from the minds of the members of Congress at the time than subjecting the broadcast news media to possible incarceration and fines for informing the public of the results of legal state lotteries. Therefore, the Court should await a "clear and definite" expression from Congress that such conduct in fact has the "moral condemnation of the community" before subjecting the broadcast news media to the criminal sanctions of Section 1304. Cf. *Federal Commun. Com'n* v. *American Broad. Co., supra.*

Finally, as discussed in greater detail in Point II of this brief, the FCC's expansive interpretation of Section 1304 is inconsistent with the free press and free speech guarantees of the First Amendment. Accordingly, Section 1304 should be construed so as to avoid these substantial constitutional problems. *International Association of Machinists* v. *Street,* 367 U. S. 740, 749-750 (1961). In addition, Congress included an express provision in the Communications Act directing the FCC to respect First Amendment values. 47 U.S.C. § 326. Therefore,

without resolving the question whether 47 U.S.C. § 326 was intended to provide broader protection than the First Amendment, this section at a minimum evidences a congressional intent that the FCC interpret its enabling legislation to avoid conflicts with the First Amendment rights of broadcasters and their listeners. Nevertheless, the FCC has disregarded the congressional admonition in 47 U.S.C. § 326 by giving Section 1304 an expansive interpretation which has the effect of censoring radio and television news stories concerning a matter of general public interest.

The brief submitted on behalf of the FCC, however, ignores the context in which Section 1304 was enacted, the fact that it is a penal statute which must be strictly construed and the First Amendment problems which its expansive interpretation raises, and flatly relies on a straightforward literal reading of Section 1304 (Brief for the FCC, p. 12). However, "[t]he decisions of this Court have repeatedly warned against the dangers of an approach which confines itself to the bare words of a statute." *Lynch* v. *Overholser, Hospital Superintendent,* 369 U. S. 705, 710 (1962). This warning is clearly appropriate in construing Section 1304 since, as noted by the court in *New York State Broadcasters Ass'n* v. *United States,* 414 F. 2d 990, 997 (2nd Cir. 1969), cert. denied 396 U. S. 1061 (1970), a literal interpretation of "information concerning" a lottery ". . . could include, for example, an editorial for or against continuing the lottery experiment started by New York State in 1967," which would be clearly violative of the First Amendment.

Equally important, as the court also noted in the *New York State Broadcasters* case, ". . . the words of section 1304 were patterned after the language of the mail statute which had long been narrowly construed." 414 F. 2d at 997. In *Commerford* v. *Thompson,* 1 Fed. 417 (C. C.

Ky. 1880), the court held that a letter transmitting money to a lottery company was not a "letter concerning a lottery" within the meaning of the predecessor of Section 1302. The court said:

> "It is obvious that this word ['concerning'] was not intended to be used in its broadest sense, 'pertaining to or relative to,' as such construction would include every letter of which the enterprises mentioned in the section were wholly or in part the subject, comprising not only letters written in the interest of these enterprises, but letters of inquiry, letters seeking legal advice, letters written for the purpose of suppressing their business, and even the correspondence carried on between the defendant and the general post-office in this case. This certainly was not the intention of congress.
>
> "The word 'circular,' we think, affords a clew to the meaning of this section. *This word obviously refers to circulars sent out by lottery companies for the purpose of advertising their schemes, and the word 'letter' used in connection with it, under the rule of 'ejusdem generis,' imports letters of a similar character and mailed for a like purpose.*" 1 Fed. at 420 (Emphasis added).

Similarly, in *United States* v. *Mason*, 22 F. 707 (C. C., E. D. Va. 1884), the court found that Section 1302 had not been violated by sending a letter to a lottery dealer ordering tickets, saying:

> "It is very plain that the broad, literal terms of this statute are to be restricted in some manner. It declares that the mailing of any letter concerning a lottery shall be punishable; so that a father writing his son, warning him against spending money upon tickets in any specified lotteries, would be indictable for a criminal offense. That cannot be the meaning of the statute. It must be construed, not according to its literal terms, but with reference to the evil to which congress was addressing itself, and the remedy it intended to provide for the suppression of that evil. The phrase employed by congress is, '*letter* or *circular* concering a lottery.' The two terms are used synonymously as to the person mailing the things referred to. A letter is indited to a particular person; a circular is intended for a number of persons. Whoever was in the mind of congress as mailing the circular, was in its mind as mailing the letter." 22 F. 2d at 707.

Obviously, it would be inappropriate to interpret the words "information concerning" in Section 1304 literally to prohibit any broadcast communication pertaining to lotteries, just as the courts in *Commerford* and *Mason* refused to interpret "letter concerning" in Section 1302 to refer to any communication through the mails pertaining to a lottery; otherwise, even an editorial condemning lotteries or a human interest story concerning a winner would be barred. Rather, the words "information concerning" should be read in light of its association with "advertisement" just as "letter concerning" was read in light of "circular" in the *Commerford* and *Mason* cases.

The clearest indication of the pointlessness of a literal interpretation of Section 1304 is the fact that the FCC itself has not been faithful to this approach, but rather has issued a declaratory ruling containing a detailed listing of the types of information concerning a lottery which it deems to fall within the prohibition. The FCC's ostensible test for determining which items are prohibited by Section 1304 is whether the information they provide "directly

promotes" a lottery. *Cf. New York State Broadcasters Ass'n* v. *United States, supra.* The ellusiveness of this test is well illustrated by comparing the types of broadcasts which the FCC has concluded are prohibited by Section 1304 with those which it says are not. For example, the FCC has decreed that the live broadcast of the drawing of a winning lottery ticket by a prominent actress or a government official would be prohibited by Section 1304, whereas interviews with persons holding winning lottery tickets, relating to the number of tickets they purchased, their expectation of winning a prize, their reaction upon learning that they held winning tickets, and what they intend to do with the prize money, would be permissible. *In the Matter of Broadcasting of Information On Lotteries* (Supplemental Declaratory Ruling) 21 F.C.C. 2d 846 (adopted February 26, 1970). It is impossible to resist the conclusion, after reviewing these fine distinctions drawn by the FCC, that the agency has not given Section 1304 even the literal interpretation espoused in its own brief. Rather, in the guise of interpretation, it has simply adopted its own version of a lottery prohibition. However, the FCC plainly lacks the authority to pursue its own present conceptions of the public policies which should govern the media by giving Section 1304 a scope far broader than that fairly intended by Congress at the time it was enacted.

The present case is a peculiarly inappropriate one for the court to defer in any respect to the policies of the executive branch, for not only are basic First Amendment values implicated but the value judgments which underlie the FCC's policy are directly contrary to those expressed in the lottery-enabling constitutional provisions and legislation of the State of New Jersey and a majority of the states in the Northeast. Therefore, as the Court stated in holding that the FCC had erroneously construed Section 1304 to prohibit television give-away shows, "[r]egardless

of the doubts held by the Commission and others as to the social value of the programs here under consideration, such administrative expansion of §1304 does not provide the remedy." *Federal Commun. Com'n* v. *American Broad. Co., supra* at 297.

POINT II

Insofar as the lottery provision is construed by the Federal Communications Commission to restrain the broadcasting of news regarding the New Jersey lottery, it improperly inhibits the right of the Lottery Commission and broadcasters to send and the right of the public to receive information through radio and television and thereby violates the First Amendment to the United States Constitution.

"There is little need to reiterate that the freedoms of speech and of the press rank among our most cherished liberties." *Pittsburgh Press Co.* v. *Human Relations Comm.*, 413 U.S. 376, 381 (1973). It is also clear that television and radio are "press" for purposes of determining the constitutionality of government regulation. *Columbia Broadcasting* v. *Democratic Comm.*, 412 U.S. 94 (1973). Furthermore, except to the extent that the scarcity of radio and television frequencies imposes an obligation on broadcast licensees to permit others to use broadcast facilities to express their views (*Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367 (1969)) or that the captive nature of the broadcast audience requires protection of listeners from offensive material (*Columbia Broadcasting* v. *Democratic Comm., supra* at 127-128), there is no distinction between electronic and other means of communication in the breadth of the protections conferred upon the press by the First Amendment:

> "Radio and television were, of course, unknown media when freedom of the press was written into the Bill of Rights, but no rational distinction can be made between radio and television on the one hand and the press on the other in affording the constitutional protection contemplated by the First Amendment . . . ." *Rosenbloom* v. *Metromedia, Inc.*, 415 F. 2d 892, 895 (3rd Cir. 1969), *aff'd* 403 U.S. 29 (1971).

The First Amendment protection of free speech embraces the right to hear. Thus, the Court found that an enactment requiring the Postmaster General to detain Communist political propaganda and to deliver it only upon the addressee's request was an unconstitutional infringement upon the addressee's right to receive information. *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965). The right to receive information has been given special recognition in the context of radio and television broadcasting in *Red Lion Broadcasting Co.* v. *F.C.C.*, *supra*:

> ". . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the F.C.C." 395 U.S. at 390.

It is also now well established that the protections of the First Amendment are not restricted to political discourse. As stated by the Court in *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967): "the guarantees for speech and press are not the preserve of political expression or comment upon public affairs." Indeed, one of the principles which underlies the First Amendment is that it is beyond the province of government to tell its citizens what is "significant" or "worthwhile" for them to hear and see. The Court appropriately noted in *Winters* v. *New York*, 333 U.S. 507, 510 (1948):

> "The line between the informing and the entertaining is too elusive for the protection of that basic right . . . . What is one man's amusement teaches another's doctrine."

A similar view was expressed by the District Court in the context of broadcasting in *Federal Commun. Comm'n* v. *American Broad. Co.*, 110 F. Supp. 374 (S.D. N.Y. 1953), *aff'd* 347 U.S. 284 (1954), in rejecting the FCC's attempt to invoke Section 1304 to enjoin television "give-away" shows:

> "The merits of the 'give-away' programs are not an issue in this case. They appear to be a source of amusement for many thousands of people. Even if it could be said that 'we can see nothing of any possible value to society' in these programs, 'they are as much entitled to the protection of free speech as the best of literature or music.'" 110 F. Supp. at 389.

The full reach of the constitutional protection extended to news broadcasting was perhaps best expressed in *Jenkins* v. *Dell Publishing Co.*, 251 F.2d 447 (3rd Cir. 1958), *cert. den.* 357 U.S. 921 (1958) where the court said:

> "In the verbal and graphic publication of news, it is clear that information and entertainment are not mutually exclusive categories. A large part of the matter which appears in newspapers and news magazines today is not published or read for the value

or importance of the information it conveys. Some readers are attracted by shocking news. Others are titillated by sex in the news. Still others are entertained by news which has an incongruous or ironic aspect. Much news is in various ways amusing and for that reason of special interest to many people. Few newspapers or news magazines would long survive if they did not publish a substantial amount of news on the basis of entertainment value of one kind or another. This may be a disturbing commentary upon our civilization, but it is nonetheless a realistic picture of society which courts shaping new juristic concepts must take into account. In brief, once the character of an item as news is established, it is neither feasible nor desirable for a court to make a distinction between news for information and news for entertainment in determining the extent to which publication is privileged." 251 F.2d at 451.

There are only a few limited categories of communication which fall beyond the protective umbrella of the First Amendment. Among these are the various categories of communication which the Court has characterized as "fighting words" (*Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942)) obscenity (*Roth* v. *United States,* 354 U.S. 476 (1957)) and libel (*New York Times* v. *Sullivan,* 376 U.S. 254 (1964)). The Court has also held that speech in the commercial sphere (*Pittsburgh Press Company* v. *The Pittsburgh Commission on Human Relations, supra; Valentine* v. *Chrestensen,* 316 U.S. 52 (1942)) and the communication of ideas by conduct (*United States* v. *O'Brien,* 391 U.S. 367 (1968)), do not enjoy the same protection accorded other forms of speech.

It is clear, however, that the broadcasting of winning lottery numbers as part of a regular news show does

not fall within any of these recognized exceptions to the general protection of speech afforded by the First Amendment. The simple recitation of a winning lottery number is obviously not libelous or obscene. Nor is there any suggestion that communication concerning a legal state lottery may tend to invite a breach of the peace. Finally, it could not seriously be argued that news broadcasting falls within the parameters of the commercial speech doctrine or that the selection of material for a news show is to be judged by the tests which govern communication by conduct. It is not surprising, therefore, that the FCC does not rest its defense of the constitutionality of Section 1304 as construed by that agency on any recognized exception to the protections of the First Amendment.

Rather, the FCC seeks to fashion a new exception to the protections of the First Amendment by threading together several separate points which it discerns in existing case law: (1) that the First Amendment shields broadcasters more narrowly than others (Brief for the FCC, pp. 17-19); (2) that the Government could "suppress" lotteries entirely and therefore it has a lesser power ". . . to ban words, written or spoken, in furtherance of a lottery" (Brief for the FCC, p. 22); and (3) that the broadcast of a winning lottery number on a news show is not "news" but rather "an ingredient of the lottery operation" and therefore beyond the protection of the First Amendment (Brief for the FCC, p. 23). None of these points, either individually or collectively, is persuasive in the present context.

Although the Court has recognized that the broadcast media ". . . present an unusual order of First Amendment values," *Columbia Broadcasting* v. *Democratic Comm., supra,* 412 U.S. at 101, it has never said that the media and its viewers and listeners are entitled to

only a "watered down" version of First Amendment protections. Rather, where the Court has sustained restrictions on the journalistic freedom of broadcasters, it has done so to protect the constitutional and personal rights of viewers and listeners. In *Red Lion Broadcasting Co.* v. *F.C.C., supra,* the Court concluded that the scarcity of broadcast frequencies makes broadcasters public trustees of the airwaves and that where there is a conflict between the right of broadcasters to exercise unfettered control over what may be broadcast on their stations and the right of viewers to be exposed to the full gamut of ideas and experiences, "[i]t is the right of the viewers and listeners, not the right of broadcasters, which is paramount." 334 U.S. at 390. However, there is no issue in this case of the exclusion of anti-lottery views from the airwaves, so the scarcity of broadcast frequencies is irrelevant. The Court also has recognized that Congress and the FCC may take into account "[t]he 'captive' nature of the broadcast audience" by imposing restrictions upon commercial advertisements. *Columbia Broadcasting* v. *Democratic Comm., supra,* 412 U.S. at 127. It is in part this characteristic of the broadcast media, and particularly the difficulties it poses for parents in protecting their children from injurious influences, which was relied upon in sustaining the ban on the broadcast of cigarette advertisements in *Capital Broadcasting Co.* v. *Acting Attorney General,* 333 F. Supp. 582 (D. D. C. 1971), aff'd 405 U.S. 1000 (1972). But the recitation of a winning lottery number on a news broadcast has no adverse influence in any way comparable to the subliminal impact of cigarette commercials. Therefore, the FCC understandably has not attempted to support the constitutionality of its interpretation of Section 1304 by reliance on the "captive audience" doctrine.

The contention that since lotteries could be "suppressed", words in furtherance of them can be banned,

represents a curious ellipsis. In those limited contexts where the Court has sustained restrictions on freedom of communication, it has done so in the name of some overriding countervailing interest. See *e.g. Schenck* v. *United States,* 249 U.S. 47 (1919) (to prevent the obstruction of military subscription during wartime); *Dennis* v. *United States,* 341 U.S. 494 (1951) (to prevent overthrow of government by violent revolution); *Branzburg* v. *Hayes,* 408 U.S. 665 (1972) (to promote a full and fair fact finding process within the grand jury system); *Red Lion Broadcasting Co.* v. *F.C.C., supra* (to protect the right of the people as a whole to receive full range of communication in the marketplace of ideas); *Giboney* v. *Empire Storage & Ice Co.,* 336 U.S. 490 (1949) (to prohibit action in furtherance of agreements in restraint of trade). See also *Hiett* v. *United States,* 415 F. 2d 664 (5th Cir. 1969), *cert.* den. 397 U.S. 936 (1970). The strength of the interest required to support any restriction on freedom of communication has varied depending upon several factors, such as whether the subject of the communication has been legal or illegal (see *e.g. Pittsburgh Press Co., supra; Giboney* v. *Empire Storage Co., supra*), whether the communication has been in a commercial context (*Pittsburgh Press Co., supra*), and whether the speech has been coupled with action (*Grayned* v. *City of Rockford,* 408 U.S. 104 (1972)), but no case has sustained a restriction on communication without articulating some interest which would be furthered thereby.

Here, the subject of the communication is a legal state lottery, presented in the context of news broadcasting, and it cannot be said to have any discernible relationship with action. It would therefore require, under any view of the First Amendment, a particularly strong showing for a restriction on news broadcasts of winning state lottery numbers to be sustained.

One might have expected, before reading the briefs in this case, that the FCC would seek to defend its interpretation of Section 1304 by appealing to thread worn moralisms about the evils of gambling. However, it has artfully avoided this position by simply describing lotteries as "suppressible". It is easy to see why the FCC has refrained from urging that there is a public interest in the prevention of gambling which outweighs the First Amendment interests of the media and its listeners. Radio and television communications concerning gambling are pervasive. Sports broadcasters freely discuss the "point spreads" on each week's football games as well as the "winning combination" of numbers in the daily doubles at the local racetracks. Additionally, the sale of various consumer products is promoted on radio and television through advertisements of "give-away" contests in which winners are determined by chance. Most significantly, radio and television broadcast advertisements encouraging people to come to racetracks and to participate in off-track betting; and the FCC has not only declined to take action against such advertising, but has affirmatively acknowledged, by a declaratory ruling released April 3, 1973, that state-run off-track betting serves a legitimate state interest and therefore may be broadcast:

> ". . . While we remain convinced that virtually any inducement to bet may cater generally to the gambling spirit, we conclude now that our ruling paid insufficient attention to New York's legislative determination that legal off-track betting would serve public needs.
>
> • • •
>
> "12. When the New York legislature approved off-track betting, it determined that two public needs would be served; the raising of revenues and the suppression of illegal gambling. The legislature thus gave that activity a status similar to legalized on-track betting. We see no reason to revise our 1964 Policy Statement; however, we also are not in a position to go behind the legislature's judgment that off-track betting serves legitimate public needs in New York State. To accommodate both our established policy and the State's policy, we now conclude that appropriate advertisements in support of OTB should not be prohibited." *In the Matter of Broadcasting of Information Concerning Horse Races,* FCC 73-355 (released: April 3, 1973).

If the concern over the promotion of illegal gambling does not outweigh the legitimate public interests served by off-track betting, this conclusion should be even more evident with respect to a legal state lottery.* It is common knowledge that horse racing is the subject of illegal gambling operations, and that off-track betting information may potentially aid illegal gambling operations. There are no indications, however, that the results of legal state lotteries are being used for comparable purposes. Thus, the only adverse consideration which the FCC has deemed significant in connection with the broadcasting of horse-race results is absent here. Therefore, whatever arguments might be advanced in another social milieu that prevention of gambling outweighs the free speech guarantees of the First Amendment, it is manifest from the FCC's own enforcement policies that the public interest

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* Indeed, it might be argued that any congressional effort to prevent communications by broadcasters concerning a state lottery while permitting similar communications involving off-track betting is an "arbitrary and invidious" distinction violative of the equal protection guarantees of the Fifth Amendment. See *Dandridge* v. *Williams,* 397 U. S. 471 (1970).

in keeping communications concerning legal state gambling away from the American public is simply non-existent.*

Finally, the FCC's claim that the broadcasting of winning lottery numbers as part of regular news shows should not be viewed as "news," for First Amendment purposes, is untenable. Initially, it should be reemphasized that the protections of the First Amendment are not limited to comments upon public affairs or the "exchange of ideas" but rather extend to the full range of communications, including the trivial or the entertaining. *Time, Inc.* v. *Hill, supra; Winters* v. *New York, supra; Federal Commun. Com'n* v. *American Broad. Co., supra; Jenkins* v. *Dell Publishing, supra.* Therefore, a conclusion that the broadcast of winning lottery numbers as part of regular news shows is "news" is not a prerequisite for protection under the First Amendment. The most significant consideration in First Amendment terms is rather that the selection of a communication has been made by the editorial staff of the broadcaster. This sharply distinguishes the present case from *Capital Broadcasting* v. *Mitchell, supra,* where the court relied heavily upon the commercial speech doctrine in sustaining the validity of the congressional ban on cigarette advertising. Similarly, in affirming the prohibition against newspapers using illegal sex-designated columns for help wanted advertisements, the Court emphasized that its decision did not ". . . authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors." 413 U.S. at 391. Here, it is undisputed that there is an intense general public interest in New Jersey State Lottery, and that the broadcasting of winning numbers on news shows represents the response of the broadcaster, in the exercise of its editorial judgment, to meet this public demand. The protection of this communication from government regulation thus goes to the very essence of the rights of a free press which the First Amendment was designed to protect.

* The Congressional view of lotteries is also not without its ambiguities. Although 12 U.S.C. §25a prohibits banks from selling lottery tickets, they are allowed to continue distributing lottery tickets, receiving the proceeds of ticket sales, paying lottery prizes, keeping books and records for the Lottery Commissions of various states, and performing other services for state lotteries. Senate Rep. No. 727, 90th Cong., 1st Sess. (1967). Furthermore, the Excise Tax Reduction Act of 1965 (P.L. 89-44, §813, 79 Stat. 170), granted complete exemptions for state-operated lotteries from the $50 annual federal occupational tax on persons receiving wagers and from the ten percent federal excise tax on wagers. See *Marchetti* v. *United States,* 390 U. S. 39, 42 (1968).

In view of the superior interest of the states in the local moral fabric, the right of the public "to receive information and ideas, regardless of their social worth", (*Stanley* v. *Georgia,* 394 U.S. 557, 564 (1969)) and the demonstrated democratic choice of the New Jersey voters in approving a constitutional amendment for the State-operated lottery, the elusive harmful effects of lotteries which the FCC has refrained from even discussing are too light to outweigh the First Amendment interests of broadcasters and listeners in the uncensored broadcasting of news about a subject of widespread public interest. Therefore, even if the Court could find an unmistakable congressional intention to prohibit the broadcasting of winning lottery numbers as part of regular news shows, such a law would violate the First Amendment guarantees of free speech and freedom of the press.

CONCLUSION

It is respectfully submitted for the foregoing reasons that the Court should affirm the judgment of the Third Circuit of the Court of Appeals, which reversed the declaratory ruling of the Federal Communications Commission that the broadcasting of winning numbers in a legal state lottery is prohibited by 18 U.S.C. § 1304.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974

No. 73-1471

UNITED STATES and
FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

—v.—

NEW JERSEY STATE LOTTERY COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 73-1471

UNITED STATES and

FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

-v.-

NEW JERSEY STATE LOTTERY COMMISSION,

Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Third Circuit

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

Interest of Amicus [1/]

The American Civil Liberties Union is a non-profit, non-partisan organization

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1/ This brief is filed with consent of the parties. The letters of consent have been filed with the Clerk of the Court.

of 250,000 members engaged solely in defense of the Bill of Rights. Of all the rights protected by the Bill of Rights, the Union has always placed special emphasis on the freedoms of speech and of the press protected by the First Amendment. Those rights are violated in this case by the terms of 18 U.S.C. §1304 which forbids the broadcasting of "any advertisement of or information concerning any lottery . . . ." We believe that that statute, as construed in this case to prohibit the broadcasting each week of the winning lottery number in the New Jersey lottery, is unconstitutional, as the United States Court of Appeals held below, 491 F.2d 219 (1974).

Summary of Argument

I. The First Amendment forbids adoption of the petitioner's central claim that speech which "promotes" an activity "which government may properly discourage or outlaw", may itself be suppressed.

II. Scarcity of broadcast frequencies and the licensing scheme justified by that scarcity permits some governmental regulation of broadcasters which the first amendment would not permit in the case of the print media. Cf. National Broadcasting Co. v. United States, 319 U.S. 190 (1943), to Miami Herald Publishing Co. v. Tornillo, 42 U.S.L.W. 5098. Thus, the fairness doctrine and Section 315, do not prohibit

broadcasters from airing any type of information or opinion, but only require that competing opinions also be broadcast. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969). But broadcast speech, like any speech, can be suppressed, if at all, only if it falls within one of the exceptions to the First Amendment. The government in this case relies on the commercial speech exception. But as that exception is defined in Pittsburgh Press v. Human Relations Commission, 413 U.S. 376 (1973), particularly in relation to the prohibitions of the First Amendment, the information involved here cannot be said to be commercial speech because it is broadcast as news, because it relates to a lottery which is lawful under state law, and because it does not involve fraudulent or deceptive marketing practises.

Finally Section 1304, as interpreted by the FCC and the Second Circuit in New York State Broadcasters v. United States, 414 F.2d 990 (2d Cir. 1969), cert. denied 396 U.S. 1061 (1970), is impermissibly vague for it fails adequately to distinguish between "items having only limited news value that directly promote a lottery", and "ordinary broadcast journalism." Winters v. New York, 333 U.S. 507 (1948).

A R G U M E N T

Introduction

The question before the Court is whether 18 U.S.C. §1304, to the extent it prohibits the broadcasting as news of "any . . . information concerning any lottery" is unconstitutional, either on its face or as applied by the Federal Communications Commission ("FCC" or "the Commission").

Relying on the Second Circuit's decision in New York State Broadcasters Assn. v. United States, 414 F.2d 990 (2d Cir. 1969), cert. denied, 396 U.S. 1061 (1970), the FCC held that §1304 prohibits broadcasters from announcing as news the winning numbers in legal state lotteries and other information "having only limited news value"2/ and "directly promoting a lottery."3/

2/ Appendix to Petition for Writ of Certiorari, hereafter cited as "Pet. App.", at 20a.

3/ Id. at 21. The FCC, reaffirming its 1970 Supplemental Declaratory Ruling, 21 FCC 2d 846 (1970), listed the following information which it considers both promotional and of only limited news value and which therefore would violate §1304 if contained in a radio or television station's news reports: "Announcements (unpaid) of the places where lottery tickets may be purchased, where, how and when winning tickets will be drawn, the amount of prizes, and how the proceeds of the sales of lottery tickets are and will be distributed." Pet. App. at 20a.

By judgment here under review, the Third Circuit en banc unanimously set aside the Commission's order on the ground that the agency "misconstrued the congressional mandate" because nothing in §1304

> was intended to permit the exercise by the FCC of control over editorial decisions of broadcast journalists. On the contrary as 47 U.S.C. §326 4/ makes clear, Congress expected the FCC's actions to be consistent with the first amendment (Pet. App. 5a).

4/ (Footnote not in original.) Section 326 provides:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

The court below summarized its constitutional analysis as follows:

> The first amendment makes clear that it is beyond the competency of any governmental agency to determine, a priori, that any item of information is, for any news medium, not news (Pet. App. 7a).

5/

Petitioners contend that both the words and the legislative history of Section 1304 belie any Congressional intention to exclude news coverage from that statute's prohibitions and, accordingly, "[i]f the present [FCC] ruling contravenes Section 326, it must be because it 'interfere[s] with the right of free speech guaranteed by the First Amendment'"(S.G.Br. 17). We agree with this formulation of the legal question before the Court; the issue is purely constitutional. Accordingly, this brief discusses only the First Amendment implications of Section 1304 and the FCC's interpretation of that statute.

We suggest that the "lottery information" ban of Section 1304 violates the

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5/ Hereinafter the Brief submitted by the Solicitor General on behalf of petitioners United States of America and Federal Communications Commission is cited as "S.G. Br. __" and petitioners are generally referred to as "the Government."

First Amendment's free press guarantee by curtailing broadcasters' journalistic discretion to determine what is newsworthy and how to report the news. 6/ The judicial 7/ and administrative 8/ attempts to limit the scope of the statutory prohibition to information of only "limited news value" which primarily "promotes" lotteries cannot transform censorship into permissible government regulation; rather, they only perpetuate censorship by replacing an absolute news ban with a qualified prohibition which is at once vague and overbroad. Accordingly, as the facts of the instant case demonstrate, the statutory ban on broadcasting "lottery information" must be invalidated. 9/

6/ The court below held that "[t]he FCC ruling imposes a small prior restraint. It is, nonetheless, a prior restraint upon dissemination of information of interest, on the day of the lottery, to perhaps 58% of New Jersey's adult population."(Pet. App. 5a). Cf. Near v. Minnesota, 283 U.S. 697 (1931).

7/ New York State Broadcasters Association, supra.

8/ Supplemental Declaratory Ruling, supra.

9/ The court below apparently decided as a matter of statutory interpretation that the FCC is barred by 47 U.S.C. §326 from apply-

ing 18 U.S.C. §1304 to any news programming or other programming which is not paid commercial advertising. But this is far from clear. The court concluded its opinion with the following statement: "Possibly, as Judge Feinberg suggests in New York State Broadcasters, some uncompensated promotional announcements outside the context of broadcast journalism might be found by the FCC to be promotional, and not news, and hence prohibited by 18 U.S.C. §1304. We need not decide that issue in this case." (Pet. App. 9a).

The issue before this Court can be narrowly perceived as whether Section 1304, to the extent it applies to a broadcaster's news judgment and programming, unconstitutionally punishes protected speech. However, the line between "news" and other programming is too fuzzy to be injected into constitutional adjudication. Compare Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973). Accordingly, this Court should affirm the ruling below, but should do so by holding that news programming and other journalistic judgments regarding "lottery information" cannot constitutionally be curtailed and thus that Section 1304's "lottery information" prohibition is void under the First Amendment.

I.

PETITIONERS' ARGUMENTS

Before attempting to analyze the legal issues, it is important to clarify the arguments advanced by petitioners. First, the Government does not rely upon differences between the print and the broadcast media as a rationale for finding that Section 1304 is constitutional. While claiming that "the peculiar characteristics of the electronic media" 10/ might justify a type of censorship which could not be applied to the print media, the Government specifically declines to rely on this argument. 11/

Second, although this Court, most recently in Pittsburgh Press, has developed a constitutional distinction between commercial and non-commercial speech, the Government maintains that this distinction is either meaningless or inapplicable here because certain information is inherently commercial and that any journalistic decision to cover such information as "news" cannot be garbed with "First Amendment immunity" (S.G.Br. 21).

10/ S.G.Br. 18, quoting from Pittsburgh Press Co. v. Human Relations Commission, 413 U.S. 376, 387 (1973).

11/ "We do not . . . rest our submission entirely, or even principally, on the peculiar characteristics of the electronic media!" S.G.Br. 19.

Begging away the underlying question, the Government asserts that "[a]n editorial decision cannot of itself insulate material from otherwise legitimate governmental control" (Id.).

Third, the Government suggests that an activity need not violate the law for Congress to ban journalistic speech about it.12/ Rather, petitioners argue that "the constitutionality of legislation banning speech has little if anything to do with the legality of the connected activity. The dividing line is elsewhere" (S.G.Br. 20-21).

Fourth, the Government does not indicate where to draw the dividing line, nor does it suggest how to define that line with sufficient clarity to avoid the pitfall of vagueness. Instead, petitioners propose an "objective" test: "[g]iven an activity which government may properly discourage or outlaw . . . [is] the speech to be banned . . . promotional"? (S.G.Br. 23). 13/ Where

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12/ The record before the Court concerns information about legal state-run lotteries.

13/ This standard is explained as follows: "What matters is whether the communication must realistically be deemed an aspect of the activity sought to be controlled, or rather, a discussion or commentary upon it. For the First Amendment protects the exchange of "ideas" (Red Lion . . .), "debate" (New York Times v. Sullivan. . .), not mere words."

such a determination is made either legislatively or administratively, the Government contends that the Court's First Amendment inquiry is over and that the prohibition must be upheld. 14/

Amicus suggests that the history of governmental efforts at censorship is dotted with arguments substantially identical to those offered here by petitioners, i.e. that speech which is governmentally perceived as dangerous can be banned on that basis alone. Petitioners blithely urge this Court to abandon the requirement that before speech can be punished or restrained the government must demonstrate that it poses a "clear and present danger" 15/ of "inciting or producing imminent lawless action." 16/ This Court has never suggested, let alone held, that a general category of information, insofar as the media recognizes it as "news" can pose such a danger--and there is no reason to so retreat from the First Amendment in this case.

14/ Compare Marbury v. Madison, 1 Cranch 137 (1803).

15/ Schenck v. United States, 249 U.S. 47, 52 (1919).

16/ Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

II.

THE FIRST AMENDMENT PRECLUDES THE GOVERNMENT FROM PROHIBITING NEWS COVERAGE OF INFORMATION WHICH "PROMOTES" LOTTERIES.

A. The First Amendment Protects Broadcasters Serving a Journalistic Function.

In Pittsburgh Press, this Court stated that "[t]he durability of our system of self-government hinges upon the preservation of [press and speech] freedoms.

> '[S]ince informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern . . . . A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.' Grosjean v. American Press Co., 297 U.S. 233, 250 (1936)." 413 U.S. at 382.

As the Court has recognized, the broadcast media serve an important journalistic function and as such operate as "the press" and are protected by the First Amend-

ment. 17/ While the scarcity of broadcast frequencies and the licensing scheme justified by that scarcity 18/ permits some governmental regulation of broadcasters which the First Amendment would not permit in the case of the print media, 19/ the First Amendment does not tolerate governmental intrusion into the journalistic discretion of broadcast licensees. 20/ Although regulations like the fairness doctrine and the candidate's "equal opportunities" requirement of Section 315(a) of the Communications Act, 47 U.S.C. §315(a), could not be imposed on the printed press, 21/ these regulations do not prohibit broadcasters from airing any type of information or opinion. They only

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17/ See Columbia Broadcasting System v. Democratic National Committee, supra, note 12 (cited hereinafter as "CBS"); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948).

18/ See National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

19/ See Miami Herald Publishing Co. v. Tornillo, 42 U.S.L.W. 5098 (June 25, 1974).

20/ See CBS, supra, and Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 387 (1969).

21/ Tornillo, supra.

require that if broadcasters air certain information they must also air other views. 22/

Perhaps because it is beyond dispute that broadcasters possess no less substantial First Amendment rights to choose and cover the news than other news media, the Government, as noted above, does not contend that the rationale for government regulation of broadcasting justifies a governmental imposition of greater news censorship on broadcasters than on other media. To the extent Section 1304 imposes a restraint on broadcasters' affirmative journalistic discretion which the government could not

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22/ Thus, this Court in Red Lion affirmed the existence of broadcasters' First Amendment rights while sustaining fairness doctrine requirements that broadcasters air all sides of important issues: "The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others." 395 U.S. at 387 (emphasis added).

23/ "For better or worse, editing is what editors are for; and editing is selection and choice of material." CBS, supra, 412 U.S. at 124.

constitutionally impose on newspapers or magazines, the statute is unconstitutional. 24/

Section 1304, as interpreted by the FCC and the Second Circuit, prohibits journalistic decisions to report as news information which "directly promotes a particular lottery." 25/ Such a restriction on any news medium clearly constitutes censorship and

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24/ In addition to banning lottery information, 18 U.S.C. §1304 also prohibits the advertising of lotteries; this latter part of law is not before the Court. Cf. Capitol Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972), affirming 333 F. Supp. 582, 584 (D.D.C. 1971); Larus & Brother Co. v. Federal Communications Commission, 447 F.2d 876 (4th Cir. 1971).

25/ New York State Broadcasters, supra, 414 F.2d at 997.

It is noteworthy that the instant case was triggered by a New Jersey radio station's desire to report to a New Jersey audience the results of the New Jersey State Lottery. This type of news coverage falls within the FCC's affirmative requirement that broadcasters cover important local issues:

is unconstitutional unless it falls within one of the exemptions to the First Amendment. Accordingly, we next examine these exemptions and indicate why none are applicable here.

The Congressional scheme of TV allocations is based on local outlets. See Sections 307(b), 303(s); S. Rept. No. 1526, 87th Cong., 2d Sess.. If a television station does not serve in a substantial manner as a local outlet . . . it is clearly not meeting its crucial role. In re Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming From the Comparative Hearing Process, 27 FCC 2d 580, 581 (1971).

Since a broadcaster best knows the particular needs and concerns of the community it serves, it bears the responsibility for devising programs and covering issues which are tailored to the specific community. In this case, a licensee made an editorial decision that since approximately 58% of the adult population in New Jersey purchases lottery tickets in an average week, the winning number(s) constitute "a bona fide news item" in which the public has a "keen interest." (Pet. App. 10)

B. News Coverage of Information About Legal Lotteries Does Not Fall Within Any Exception to the First Amendment.

We are here dealing "solely" with "speech"

> not [with] any separately identifiable conduct which allegedly was intended . . . to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message and hence could be regulated without effectively repressing [First Amendment rights]. Cohen v. California, 403 U.S. 15, 18 (1971).

Accordingly, the first line of constitutional inquiry is into whether news reports about lotteries fall within any of the exceptions to the constitutional guarantees of free speech and press. 26/

1. Section 1304 is not a time, place or manner restriction. This Court has long recognized that the government may promulgate reasonable restrictions on the time, place or manner in which speech may

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26/ Since we are not here concerned with "conduct" which has speech elements or overtones, amicus does not discuss the mixed speech-conduct cases like United States v. O'Brien, 391 U.S. 367 (1968) and Adderly v. Florida, 385 U.S. 39 (1966).

be communicated. Thus, parade permits may be required, 27/ noisy sound trucks can be regulated, 28/ public sidewalks may not be obstructed, 29/ traffic may not be blocked, 30/ etc. However, where a forum is open to speech, "[s]elective exclusions . . . may not be based on content alone, and may not be justified by reference to content alone." Police Department of Chicago v. Mosley, 408 U.S. 92, 96 (1972). Since the "lottery information" ban of Section 1304 is based solely on content, it imposes impermissible censorship.

2. Where a forum like the broadcast media is entitled to First Amendment protection, this Court has held that not all

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27/ See, e.g., Cox v. New Hampshire, 312 U.S. 569 (1941).

28/ See, e.g., Kovacs v. Cooper, 336 U.S. 77 (1949).

29/ See, e.g., Cox v. Louisiana, 379 U.S. 536 (1965); compare Shuttlesworth v. Birmingham, 382 U.S. 87 (1965).

30/ See Cantwell v. Connecticut, 310 U.S. 296, (1940).

communications within that forum are entitled to such protection. Thus, obscenity 31/ is deemed to be of such little communicative worth that it is deemed to lie outside the zone of First Amendment protection. However, information about lotteries is not obscene.

3. Another form of speech which may be governmentally restrained is that which raises a "clear and present danger" of bringing about riot, assault, or other violent and/or plainly illegal results. Schenck v. United States, 249 U.S. 47, 52 (1919). Thus, "fighting words"--words which directly tend to provoke a physically violent reaction--may be punished or prevented. Chaplinsky v. State of New Hampshire, 315 U.S. 568, 573 (1941).

However, speech in the form of news coverage regarding a legal lottery, 32/ even where that speech "promotes" the lot-

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31/ Roth v. United States, 354 U.S. 476 (1957).

32/ Compare Pittsburgh Press, supra, which emphasized that want ads listed by sex are illegal and thus can constitutionally be prohibited.

tery 33/ creates no clear and present danger of violence or any other breach of the peace.

4. A type of communication which is entitled to less than full First Amendment protection is "commercial speech." 34/ This is the First Amendment loophole into which the Government seeks to place the ban on "lottery information."

There are at least two distinct types of "commercial speech" which have First Amendment significance: (1) advertising and (2) speech which is integrally part of a commercial scheme to defraud, swindle or otherwise injure the public. Since the Government argues that information tending to promote lotteries falls within both of these categories, amicus will examine each point in turn.

33/ The distinction between information which promotes a lottery and that which is legitimate news and has only incidental promotional effect is itself unconstitutionally vague. See discussion at Part C, infra, pp. 26-31.

34/ See Pittsburgh Press, supra; Breard v. Alexandria, 341 U.S. 622 (1951); and Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

A. Journalistic Coverage of Lotteries Is Not Advertising.

Pittsburgh Press defines the narrow contours of the commercial advertising exception to First Amendment protection of speech and press. First, commercial advertising is speech which does "no more than propose a commercial transaction," 413 U.S. at 385, or, in other words, which seeks to sell some goods or services. Id. at 383. 35/ Second, the Court explicitly distinguishes between "the selection of news stories" (413 U.S. at 385) by a commercial medium--even if such selection serves the commercial purpose of increasing the medium's revenues--and advertising, in which the advertiser, not the medium, is the speaker (Id. at 386); only advertising which proposes a commercial transaction constitutes "commercial speech." Third, the Court emphasizes the well-established principle that the First Amendment tolerates no governmental restrictions on the "content . . . [of] stories or commentary originated by" newspapers and other news media. Id. at 391. Fourth, labelling certain speech as "commercial advertising"

35/ Compare New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964), indicating that advertisements which do not serve a "purely commercial" purpose (Valentine, supra, 316 U.S. at 54) are not within the commercial advertising exception to the First Amendment.

does not thereby remove all First Amendment protection. In Pittsburgh Press the Court stressed that the advertisements in question promoted "illegal commercial activity" Id. at 388:

> . . . Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity. Id. at 389.

In seeking reversal in the instant case, the Government rides roughshod over this Court's carefully confined definition and analysis of commercial advertising and has the temerity to cite Pittsburgh Press for the following argument:

> "[C]ommercial" or otherwise unprotected speech cannot gain First Amendment immunity merely because it is labelled "news." An editorial decision cannot of itself insulate material from otherwise legitimate governmental control. (S.G.Br. 21).

Thus, the Government would have this Court, for the first time, replace the journalist's carefully guarded First Amendment

right to select and choose material 36/ with a governmental determination of which subject matter is not sufficiently newsworthy to warrant First Amendment protection. This not only makes a mockery of the Pittsburgh Press majority's carefully circumscribed definition of commercial advertising, but eviscerates the more fundamental First Amendment protection for the editorial judgment of print and broadcast journalists spelled out by this Court in such recent decisions as CBS, supra (all opinions), and Miami Herald Publishing Co. v. Tornillo, supra, as well as in Pittsburgh Press itself.

Equally misguided is the Government's reliance on Capitol Broadcasting Co. v. Acting Attorney General, supra. That decision holds no more than that commercial advertisements by cigarette manufacturers seeking to sell cigarettes fall within the First Amendment's commercial advertisement loophole and, accordingly, may be banned from radio and television.

The Government erroneously suggests that Capitol Broadcasting fails to distinguish between advertising in which the speaker is a commercial huckster, and news and other programming, in which the speaker is the broadcaster (S.G.Br. 19):

36/ CBS, supra, 412 U.S. at 118.

> "Nor do we suppose the result in Capitol Broadcasting would have been different if that case had involved a broadcaster who, for his own private or commercial reasons, had 'plugged' cigarette sales without direct sponsorship in defiance of a statute prohibiting such conduct."

However, Capitol Broadcasting clearly rejected this dangerous argument, basing its holding of statutory constitutionality on a finding that there is (333 F. Supp. at 584)

> "nothing in the Act or its legislative history which precludes a broadcast licensee from airing its own point of view on any aspect of the cigarette smoking question . . ." (emphasis added).

As Justice Stewart warned in his concurring opinion in CBS (412 U.S. at 146):

> "If we must choose whether editorial decisions are to made in the free judgment of individual broadcasters, or imposed by bureaucratic fiat, the choice must be for freedom."

B. Journalistic Coverage of Legal Lotteries Is Not Commercial Fraud.

The Government's attempt to fit a ban on news "promoting" lotteries under the commercial fraud exemption to the First Amendment is totally without merit. In attempting to

argue that "illegality of the underlying conduct" is irrelevant to "the First Amendment inquiry," 37/ the Government cites four cases upholding statutes "which outlaw the use of the mails or interstate communications in furtherance of activities deemed injurious to the public but not elsewhere made illegal": Capitol Broadcasting Co. v. Acting Attorney General, 333 F. Supp. 382 (D.D.C. 1971), aff'd 405 U.S. 1000; Public Clearing House v. Coyne, 194 U.S. 497 (1904); Donaldson v. Read Magazine, Inc., 333 U.S. U.S. 178 (1948); E. F. Drew & Co., Inc. v. Federal Trade Commission, 235 F.2d 735 (2d Cir. 1956), certiorari denied, 352 U.S. 969 (1957).

With the exception of Capitol Broadcasting, which upheld a ban on non-fraudulent commercial advertising and is plainly inapposite, each case cited by the Government involved governmental bans of fraudulent or deceptive marketing practices. 38/ The ra-

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37/ S.G.Br. at 20. Compare Pittsburgh Press, 413 U.S. at 388, 389.

38/ Public Clearing House v. Coyne involved a scheme which, in the Court's words, "lacks the elements of a legitimate business enterprise . . . [N]o scheme of investment which must ultimately and inevitably result in failure can be called a legitimate business enterprise." 194 U.S. at 515; Donaldson v. Read Magazine, Inc. involved fraudulent marketing practices which this Court held to be "swindling schemes" which may be barred from the mails, 333 U.S. at 184; E.F. Drew

tionale of each case is that when speech or writing is an integral part of a fraudulent and therefore illegal commercial scheme, the speech itself can constitute criminal behavior which may be punished or barred from the media (S.G.Br. 20).

The record before the Court involves only information about legal lotteries broadcast not by the entity running the lottery but, rather, as news. Thus, there is no underlying illegality or fraud, no false marketing scheme, no swindle, no advertising. Accordingly, the commercial fraud exemption to the First Amendment is clearly irrelevant. 39/

C. The Distinction Between Information Promoting a Lottery and Legitimate News About a Lottery is Unconstitutionally Vague.

& Co., Inc. v. FTC, involved "false and misleading advertising" of oleomargerine which the advertiser claimed to be a "dairy product." 235 F.2d at 738.

39/ Cf. FTC v. Standard Education Society, 302 U.S. 112, 116 (1937), a case in which the Court, per Justice Black, upheld a false advertising ban, concluding that the sellers' practices were "contrary to decent business standards. To fail to prohibit such evil practices would be to elevate deception in business and to give to it the standing and dignity of truth."

Section 1304 is not vague on its face--it specifically prohibits "the broadcasting of . . . information concerning any lottery . . . or any list of prizes drawn or awarded . . . whether said list contains any part or all of such prizes." However, this statute is so plainly overbroad and violative of First Amendment rights that the FCC and the Second Circuit 40/ felt impelled to create the distinction between information promoting a lottery and legitimate news. This distinction, while designed to lift the statute out of the overbreadth trap, has placed it firmly in the constitutionally forbidden territory of vagueness.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."41/ In cases where a statute touches upon speech, the courts apply "stricter standards of permissible statutory vagueness." 42/ This is because a vague statute which "abut[s] upon sensitive areas of basic First

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40/ New York State Broadcasters, supra.

41/ Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

42/ Smith v. California, 361 U.S. 147, 151 (1959).

Amendment freedoms" 43/ "operates to inhibit the exercise of [those] freedoms." 44/

These principles demonstrate that the "lottery information" ban of Section 1304, as interpreted by the FCC and the Second Circuit in New York State Broadcasters, supra, is unconstitutionally vague for it fails to delineate with sufficient precision what constitutes "items having only limited news value that directly promote a lottery" 45/ and what, on the other hand, constitutes "ordinary broadcast journalism." 46/

Perhaps the best illustration that this distinction is impermissibly vague is its treatment, almost as an afterthought, at the conclusion of the Third Circuit's opinion:

> "[S]ome uncompensated promotional announcements outside the context of

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43/ Baggett v. Bullitt, 357 U.S. 360, 372 (1964), quoted in Grayned, supra, 408 U.S. at 109.

44/ Cramp v. Board of Public Instruction, 368 U.S. 278, 287 (1961), quoted in Grayned, supra, 408 U.S. at 109.

45/ FCC Memorandum Opinion and Order, Pet. App. 21a.

46/ Id. at 21a.

> broadcast journalism might be found by the FCC to be promotional, and not news, and hence prohibited by 18 U.S. C. §1304. We need not decide that issue in this case. The announcements here involved are unadulterated broadcast journalism." Pet. App. 9a-10a.

The court below, in stating that some "promotional announcements" may be found to be "promotional," demonstrates that the "promotional" gloss to Section 1304 is so amorphous that it fails "to give fair notice of what acts will be punished" and what acts will not. Winters v. New York, 333 U.S. 507, 510 (1948).

Even the Second Circuit, which endorsed and refined the "promotional" gloss, concedes that the line between information which directly promotes a lottery and information which is true "news" about the lottery "may be thin." 414 F.2d at 997. 47/ The Second Circuit's own illustrations graphically illustrate just how thin that distinction really is:

47/ The petitioners here also admit that "there may be other cases in which it is difficult to separate promotional speech from idea communication once we apply Section 1304 to more than the pedestrian 'commercial.'" (S.G. Br. 23-24)

> [A]n announcement that a specified number of schools had been built with funds from the Lottery might generally 'encourage' the conduct of the Lottery, but we would not think it directly promotes it.

whereas,

> [I]f a lottery . . . announcement contains "news," such as the amount a lottery realized for education, it would nonetheless be banned. Id. at 998.

Another example of the ephemeral nature of the "promotional" gloss is a recent FCC decision involving the Maryland State Lottery. Letter to George P. Mahoney, 45 FCC 2d 491 (1974). The Commission there held that a broadcaster is promoting a lottery in violation of Section 1304 by airing weekly announcements reminding Maryland residents that there are many winners each week and indicating how to determine if a ticket is a winner, whereas Section 1304 does not prohibit a limited number of announcements broadcast a few times a year informing Maryland residents of large amounts of unclaimed lottery winnings and cautioning them to check any tickets they might hold. Id. at 492. The FCC itself conceded that

> [i]n the context of an ongoing lottery with weekly drawings such as Maryland's, it is difficult to distinguish between information related to a completed drawing and information related to, and possibly promoting, the lottery in general. Ibid.

The words and rulings of the Third Circuit, the Second Circuit, and the FCC all make clear that Section 1304, when read with the "promotional" gloss, is intolerably imprecise; and since "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms," NAACP v. Button, 371 U.S. 415, 438 (1963), that statute is unconstitutionally vague.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the judgment of the Third Circuit should be affirmed.

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IN THE

Supreme Court of The United States

October Term, 1974

No. 73-1471

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, Petitioners

v.

NEW JERSEY STATE LOTTERY COMMISSION, Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

AMICUS CURIAE BRIEF OF THE GOVERNMENT OF THE VIRGIN ISLANDS IN SUPPORT OF THE NEW JERSEY STATE LOTTERY COMMISSION

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AMICUS CURIAE BRIEF OF THE GOVERNMENT OF THE VIRGIN ISLANDS IN SUPPORT OF THE NEW JERSEY STATE LOTTERY COMMISSION

Your amicus is a territory that operates a lottery under the provisions of the Virgin Islands Code Annotated, Title 32, Sections 242-260 (1973 Supp.) This lottery is, in essential respects, similar to the New Jersey lottery so far as concerns the applicability of 18 U.S.C. 1304 and the regulations of the Federal Communications Commission to the broadcasting of information having news value relating to the operation of the lottery. The Memorandum Opinion and Order of the Commission which is the

subject of this proceeding, if sustained, would adversely affect the Government of the Virgin Islands in the operation of its lottery. The Virgin Islands submit that the Commission's Memorandum Opinion and Order are based in the first instance on a mistaken interpretation that 18 U.S.C. 1304 authorizes the Commission to prohibit a broadcast frequency licensee from announcing the winning lottery number as a news item in a regular news broadcast, and would, if given effect, result in substantial detriment to the legitimate interests of the Virgin Islands.

The Government of the Virgin Islands is familiar with the reasons advanced on behalf of the Respondent New Jersey State Lottery Commission in this matter, and join in Respondent's statement of these reasons and submit that the judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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October 3, 1974

CERTIFICATE OF SERVICE

I, Henry L. Feuerzeig, attorney for the Government of the Virgin Islands, Amicus Curiae, certify that on October 4..., 1974, three copies of the foregoing Amicus Curiae brief were mailed, via U.S. mail, air mail, postage prepaid, to William F. Hyland, Attorney General, State of New Jersey, State House Annex, Trenton, New Jersey 08625; Robert H. Bork, Solicitor General, Department of Justice, Washington, D.C. 20530; Ashton R. Hardy, General Counsel, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554; Warren B. Rudman, Attorney General, State of New Hampshire, State House Annex, Concord, New Hampshire 03301, and a copy to Robert K. Killian, Attorney General, State of Connecticut, 30 Trinity Street, Hartford, Connecticut 06115.

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First Assistant Attorney General

Supreme Court, U. S.
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STATEMENT IN LIEU OF BRIEF OF THE MARYLAND PUBLIC BROADCASTING COMMISSION, AMICUS CURIAE IN SUPPORT OF THE NEW JERSEY STATE LOTTERY COMMISSION

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STATEMENT IN LIEU OF BRIEF OF THE MARYLAND PUBLIC BROADCASTING COMMISSION, AMICUS CURIAE IN SUPPORT OF THE NEW JERSEY STATE LOTTERY COMMISSION

The Maryland Public Broadcasting Commission participated in this proceeding in the Court below through

a brief *amicus curiae*. As indicated by the attached consents executed by all parties to this proceeding, The Maryland Public Broadcasting Commission has complied with Rule 42.2 and it respectfully requests consideration of the instant statement in lieu of brief *amicus curiae*.

The Maryland Public Broadcasting Commission is directly and vitally interested in this proceeding concerning the legality of the position of the Federal Communications Commission. The Commission's Order under review here provides that the winning number in a legal State lottery may not be broadcast by a radio or television station. The Commission also prohibits announcements concerning the drawing of the winning lottery ticket which may be interpreted as directly promotional in nature. The Court below has ruled that the Order is invalid insofar as it proscribes the announcement of the winning lottery number as part of a newscast.

The Maryland Public Broadcasting Commission was created by the 1966 Maryland Legislative General Assembly. The Commission has been legally and financially empowered to "develop, operate, and maintain a system of State, regional, and local facilities to provide educational and cultural television programming in the State." Its members are chosen from among residents of Maryland and must by statute be broadly representative of the State as a whole, and include persons especially skilled in fields which bring special competence in educational broadcasting to the membership. The Maryland Public Broadcasting Commission has full responsibility for and control over the

preparation, content, and programming of its stations.

The Maryland Public Broadcasting Commission has developed plans for a Statewide public broadcasting network. At present it operates television stations at Baltimore, Salisbury, and Hagerstown, Maryland, and a station is under construction at Annapolis, Maryland. All of these stations are subject to the rules and regulations of the Federal Communications Commission.

In November of 1972 the citizens of Maryland overwhelmingly approved a Constitutional Referendum proposal "modifying the prohibition against the authorization of lotteries by the General Assembly in order to provide an exception for lotteries operated by and for the benefit of the State." The Maryland state lottery has since been authorized and implemented, and it operates in substantial measure as does the New Jersey state lottery which is involved in this proceeding. The Maryland Public Broadcasting Commission thus faces substantially the same situation now faced by broadcasters in New Jersey.

In the considered judgment of the Maryland Public Broadcasting Commission, as a licensee of the Federal Communications Commission and a public trustee, the broadcast of the winning lottery ticket number, and on occasion the drawing ceremony itself, has legitimate news value. As part of its news function, the Maryland Public Broadcasting Commission desires to report on the operations of the State lottery. In its role as a broadcaster and as a State institution, the Maryland Public Broadcasting Commission desires to inform citizens of the operations of the lottery. If the Federal Communications Commission's Order is upheld, the citizens of Maryland will be placed in the anomalous

position of having enacted a popular lottery program which their State-owned and operated broadcasting facilities must ignore in their reporting of Maryland news. The Maryland Public Broadcasting Commission must add its voice to those who object to the Federal Communications Commission's erroneous reading of the lottery statute.

Petitioners United States and the Federal Communications Commission in the final analysis ground their argument on the contention that the broadcast of the winning lottery number cannot be legitimately classified by editorial decision as news (Petitioners' Brief, para. 3). Yet the announcement of the winning number is clearly a report on a past event of significance to large numbers of people. Those interested people have already made their decision to participate in the State lottery, and in fact it is of course too late to participate in a particular drawing once the winning number has been chosen. Therefore the announcement of the winning number can to no significant extent constitute promotion of participation in the lottery. The Federal Communications Commission has itself recognized that an announcement of the winning number has "some limited news value," *Declaratory Ruling*, 30 F.C.C.2d 794, 795. The fact that information of at least some unquestioned news value may be viewed as incidentally promoting the activity which it reports does not justify censorship of the news. The public right to public information must be protected against such censorship.

The Maryland Public Broadcasting Commission is familiar with the points advanced in this proceeding by the Respondent New Jersey State Lottery Commission. The Maryland Public Broadcasting Commission endorses

the position of Respondent and submits that the judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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October 11, 1974

CERTIFICATE OF SERVICE

I, Louis Schwartz, a member of the Bar of the Supreme Court of the United States and counsel to the Maryland Public Broadcasting Commission, Amicus Curiae, certify that three copies of the foregoing Statement In Lieu Of Brief Amicus Curiae, were mailed, via U.S. Mail, postage prepaid, to the following attorneys of record: Stephen Skillman, Assistant Attorney General, State of New Jersey, State House Annex, Trenton, New Jersey 08625; David H. Souter, Deputy Attorney General, State of New Hampshire, State House Annex, Concord, New Hampshire 03301; Daniel R. Schaefer, Assistant Attorney General, State of Connecticut, 30 Trinity Street, Hartford, Connecticut 06115; John B. Summers, National Association of Broadcasters, 1771 N Street, N.W., Washington, D. C. 20036; Israel Packel, Attorney General, State of Pennsylvania, 238 State Capitol, Harrisburg, Pennsylvania 17120; Stephen T. Parisi, Special Counsel to William J. Brown, Attorney General of the State of Ohio, 1500 Central National Bank Building, Cleveland, Ohio 44114; Robert H. Bork, Solicitor General, Department of Justice, Washington, D. C. 20530; Thomas B. Kauper, Assistant Attorney General, Department of Justice, Washington, D. C. 20530; Lovis Claiborne, Assistant Solicitor General, Department of Justice, Washington, D. C. 20530; Danny J. Boggs, Assistant Solicitor General, Department of Justice, Washington, D. C. 20530; Ashton R. Hardy, General Counsel, Federal Communications Commission, 1919 M Street, N.W., Washington, D. C. 20554; Joseph A.

Marino, Associate General Counsel, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554; R. Michael Senkowski, Counsel, Federal Communications Commission, 1919 M Street, N.W., Washington, D. C. 20554.

Louis Schwartz

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1471

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, Petitioners

v.

NEW JERSEY STATE LOTTERY COMMISSION, Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STATEMENT IN LIEU OF BRIEF OF THE STATE OF NEW HAMPSHIRE, INTERVENOR, IN SUPPORT OF THE NEW JERSEY STATE LOTTERY COMMISSION

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IN THE
SUPREME COURT OF THE UNITED STATES

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The court below granted New Hampshire's motion to intervene in this proceeding. New Hampshire's motion to intervene was grounded on the following facts. New Hampshire operates a sweepstakes and lottery program under the provisions of New Hampshire

Revised Statutes Annotated 284:21-a - 21-v, as amended. This program is in essential respects similar to the New Jersey program so far as concerns the applicability of 18 U.S.C. 1304 and the regulations of the Federal Communications Commission to the broadcasting of information having news value relating to the operation of the program. The Memorandum Opinion and Order of the Commission which is the subject of this proceeding would, if sustained, constitute clear precedent and statement of position for the Commission in dealing with broadcasts of direct concern to the State of New Hampshire in the operation of its program. New Hampshire submits, as it has done below, that the Commission's Memorandum Opinion and Order are based in the first instance on a mistaken interpretation of 18 U.S.C. 1304 and would, if given effect, result in

substantial detriment to the legitimate interests of New Hampshire.

New Hampshire is familiar with the reasons advanced on behalf of the Respondent New Jersey State Lottery Commission's position in this matter. New Hampshire joins in Respondent's statement of these reasons and submits that the judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE,
Intervenor

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Attorney General

David H. Souter
Deputy Attorney General

Counsel for Intervenor

September 18, 1974

Supreme Court, U. S.
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In the Supreme Court of the United States

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No. 73-1471

UNITED STATES OF AMERICA
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NEW JERSEY STATE LOTTERY COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE OF OHIO IN SUPPORT OF THE NEW JERSEY STATE LOTTERY COMMISSION

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AMICUS CURIAE BRIEF OF THE STATE OF OHIO IN SUPPORT OF THE NEW JERSEY STATE LOTTERY COMMISSION

Your amicus is a state which conducts a lottery and is affected by *United States of America and Federal Communications Commission v. New Jersey State Lottery Commission*, No. 73-1471.

STATEMENT

Jersey Cape Broadcasting Corporation ("Jersey Cape"), the licensee of stations WCMC-AM, FM and TV, Wildwood, New Jersey, in February, 1971 requested that the Federal Communications Commission ("FCC") issue a declaratory ruling as to whether its proposed broadcast of a statement ["The winning state lottery number drawn today is (and then recite the winning number)."] during

three consecutive regular news broadcasts on the day of the New Jersey Lottery drawing and at no other time would violate 18 U.S.C. § 1304 of the Communications Act of 1934, which provides:

> Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

In response to this ruling request (which was later joined in by the New Jersey State Lottery Commission and others), the FCC issued a declaratory ruling holding that the broadcasting of this announcement was prohibited by 18 U.S.C. § 1304 as it would directly promote a lottery, even if the winning number had some news value to some persons. The New Jersey State Lottery Commission appealed the FCC's ruling to the Third Circuit Court of Appeals, which reversed the FCC and held that on Thursday afternoon and evening the winning lottery number is "hot news" and, as such, is protected both by the First Amendment to the United States Constitution and by another section of the Communications Act of 1934 (47 U.S.C. § 326) which provides:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

The opinion of the Third Circuit Court of Appeals is reported at 491 F.2d 219 (3rd Cir. 1974).

It should be noted that on each Thursday, the New Jersey State Lottery Commission has a difficult time meeting the public demand for the identity of the winning number. On August 19, 1971, its telephone service was temporarily suspended because of an avalanche of telephone calls. On a typical Thursday there are approximately 2,750,000 ticketholders, who, it may be assumed, would like to know the winning number. These 2,750,000 ticketholders are the equivalent of 58 percent of New Jersey's adult population. It is further estimated by the New Jersey State Lottery Commission that at least one person in eighty percent of the State's households holds a lottery ticket in any given week.

Since Ohio's lottery has been in operation only since August of 1974, there has, as yet, been no systematic study conducted to identify the buying habits of Ohio's citizens, but based upon an estimated average weekly sale of 4,600,000 lottery tickets, it can be assumed that the comparative figures for Ohio will at least approximate those provided by the New Jersey State Lottery Commission for the State of New Jersey.

Jersey Cape has decided as an exercise of its editorial judgment that a broadcast of the winning number is newsworthy and merely wishes to provide as part of its regularly scheduled news show, information which is of interest to persons in as many as eighty percent of the households in New Jersey.

ARGUMENT

A logical reconciliation of 18 U.S.C. § 1304, 47 U.S.C. § 326 and the First Amendment requires that the broadcasting as part of a regularly scheduled news show of a winning number drawn in a lawful state operated lottery is not prohibited by 18 U.S.C. § 1304.

As noted in the unanimous decision of the Third Circuit, sitting *en banc*, the FCC made no effort to reconcile 18 U.S.C. § 1304 with 47 U.S.C. § 326 and relied entirely on the former statute and the Second Circuit's decision in *New York State Broadcasters Association v. United States*, 414 F. 2d 990 (2nd Cir. 1969), certiorari denied, 396 U.S. 1061 (1970), a case which did not consider 47 U.S.C. § 326, but nonetheless limited the scope of 18 U.S.C. § 1304 to broadcasts which directly promote an existing lottery.

The Third Circuit referred to the FCC's ruling as imposing a "small" prior restraint, but a prior restraint nonetheless and one which could not be justified. It is submitted that any ruling which restrains 58 percent of New Jersey's adult population from learning of information concerning their State's activities cannot, by definition, be a "small" prior restraint.

In light of the First Amendment's mandate that "Congress shall make no law . . . abridging the freedom of speech, or of the press", 18 U.S.C. § 1304 as applied by the FCC in this instance must be held unconstitutional or construed in such a way as to make it compatible with freedom of the press. There is nothing in the legislative history of 18 U.S.C. § 1304 to indicate that Congress intended to grant to the FCC the power to control editorial decisions of broadcast journalists and 47 U.S.C. § 326 specifically negates any such intention.

The Third Circuit properly reviewed the holdings of this Court and held that Jersey Cape's proposed announcements of the winning lottery numbers are news:

> On Thursday afternoon and evening the winning lottery number is "hot news". 491 F. 2d at 222.
>
> Clearly the winning lottery number is, on Thursday afternoon, press information protected by the first amendment. *id.* at 223.

> The announcements here involved are unadulterated broadcast journalism — news — and clearly are protected by 47 U.S.C. § 326 and the first amendment rather than prohibited by 18 U.S.C. § 1304. *id.* at 224.

Having properly determined that Jersey Cape's proposed broadcast was "hot news", the Third Circuit analyzed this Court's opinions concerning circumstances where prior governmental restraints over a broadcaster's news activities could be appropriate. These included cases dealing with a broadcaster's commercial activities and Congress' right to assure that broadcasters provide fair access of competing ideas to the limited broadcast frequencies. These cases, however, were properly distinguished as not involving, as in this instance, a broadcaster who "seeks no more than to include in its regular news broadcasts on Thursday a news item of immediate, though transitory, interest to 2,750,000 persons." 491 F.2d at 223.

47 U.S.C. § 326 makes it clear that Congress did not intend that the Communications Act of 1934 impose restrictions on broadcast licensees which would violate the First Amendment. In this regard, any such legislative intention to restrict legitimate news broadcasts by 18 U.S.C. § 1304 is specifically and unequivocally negated by 47 U.S.C. § 326.

The Third Circuit appropriately sought to avoid the constitutional question and properly reconciled the two sections of the Communications Act of 1934 by restricting the application of 18 U.S.C. § 1304 to a "promotion of lotteries for which the licensee receives compensation." 491 F. 2d at 224. This is a correct ruling and should be upheld.

This is especially so in light of the FCC's contention that the Second Circuit's ruling in *New York State Broadcasters Association v. United States, supra*, Pg. 4, (only broadcasts which directly promote a lottery are prohibited

by 18 U.S.C. § 1304) requires that Jersey Cape's proposed announcements of the winning lottery numbers be prohibited as a direct promotion of the New Jersey Lottery. This is an erroneous interpretation and extension of the Second Circuit's decision for these broadcasts at best only incidentally foster the New Jersey Lottery and are not directly promotional as that term was used by the Second Circuit. In addition, the Second Circuit did not consider the mandate of 47 U.S.C. § 326 against FCC censorship when it considered the application of 18 U.S.C. § 1304, and if its decision is meant to prohibit "unadulterated" or "hot" news which might also directly promote a lottery, then its interpretation of 18 U.S.C. § 1304 is flawed and should not be followed.

CONCLUSION

It is respectfully submitted for the foregoing reasons that the judgment of the United States Court of Appeals for the Third Circuit be affirmed.

Dated this 8th day of October, A.D., 1974

Respectfully submitted,

AMICUS CURIAE
STATE OF OHIO

WILLIAM J. BROWN,
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CERTIFICATE OF SERVICE

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IN THE

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OCTOBER TERM, 1974

No. 73-1471

UNITED STATES OF AMERICA
AND FEDERAL COMMUNICATIONS
COMMISSION

v.

NEW JERSEY STATE LOTTERY COMMISSION

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

AMICUS CURIAE BRIEF OF THE STATE OF CONNECTICUT IN SUPPORT OF THE NEW JERSEY STATE LOTTERY COMMISSION

ATTORNEY GENERAL
ROBERT K. KILLIAN

By: BARNEY LAPP
Assistant Attorney General

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IN THE

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AMICUS CURIAE BRIEF OF THE STATE OF CONNECTICUT IN SUPPORT OF THE NEW JERSEY STATE LOTTERY COMMISSION

Your amicus is a state that has a lottery, and is affected by *United States of America and Federal Communications Commission* v. *New Jersey State Lottery Commission*, No. 73-1471.

1. It is our position that the ruling of the Federal Communications Commission, prohibiting news broadcasts of a state lottery's winning number, is a prior restraint upon freedom of the press, which is prohibited by the First and Fourteenth Amendments. As stated in the decision below by Chief Judge Gibbons of the Third Circuit:

"Broadcast news media, because of the immediate and highly transitory nature of their news coverage, present particular problems in this regard. They, above all news media, serve the public need to be informed on what is of immediate though of passing interest. They at least as much as the other news media should be left free to make their own editorial decisions as to what news will best serve their public. The only restraints on information by which, in the news context, the broadcast media may constitutionally be bound are those imposed by what little is left of the law of libel since *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 686 (1964) and its progeny, and by the law of obscenity (citations omitted). Clearly the winning lottery number is, on Thursday afternoon, press information protected by the first amendment."

491 F.2d 219, 223.

2. It is further noted that the Federal Communications Commission is not exempt from the dictates of the First Amendment, and this was recognized by Congress in enacting 47 U.S.C. § 326, which states:

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

3. These considerations are also significant, because the revenue devices involved in these cases are instrumental components of the fiscal systems of many state governments.

For these reasons, your amicus respectfully submits that the judgment of the United States Court of Appeals for the Third Circuit be affirmed.

Dated this 9th day of September, A.D., 1974.

Respectfully submitted,

AMICUS CURIAE

STATE OF CONNECTICUT

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CERTIFICATE OF SERVICE

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Petitioners,

v.

NEW JERSEY STATE LOTTERY COMMISSION,

Respondent

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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IN THE

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UNITED STATES OF AMERICA and
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NEW JERSEY STATE LOTTERY COMMISSION,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters (hereinafter NAB) moves pursuant to Rule 42 of this Court for leave to file a brief *amicus curiae* in the above-entitled proceeding.

The NAB is a non-profit association of radio and television broadcast stations and networks. As of April 24, 1974, NAB's membership included 2,370 AM radio stations, 1,506 FM radio stations, 532 television stations and all nationwide commercial broadcast networks. The object of NAB, according to its by-laws:

> . . . shall be to foster and promote the development of the arts of aural and visual broadcasting in all its forms; to protect its members in every lawful and proper manner from injustices and unjust exactions; to do all things necessary and proper to encourage and promote customs and practices which will strengthen and maintain the broadcasting industry to the end that it may best serve the public.

All broadcast stations are subject to the prohibitions of the criminal anti-lottery statute, 18 U.S.C. §1304 (1964), and Federal Communications Commission (hereinafter FCC) rules regarding broadcast of lottery information. 47 C.F.R. §§73.122, 73.292, 73.656 (1972). The FCC has ruled that 18 U.S.C. §1304 and its rules prohibit broadcast stations from announcing the winning number of state-conducted lotteries as part of their regular news reports. *Declaratory Ruling*, 30 F.C.C.2d 794 (1971) (hereinafter cited as *Declaratory Ruling*), *reconsideration denied, Memorandum Opinion and Order*, 36 F.C.C.2d 93 (1972).

NAB respectfully submits that Respondent, NJSLC, does not share NAB's particular interest in assuring that neither Congress nor the FCC abridges the "freedom of the press" guaranteed by the First Amendment. U.S. Const., Amend. 1. The journalistic activities of NAB's member stations are affected directly by the FCC's *Declaratory Ruling*. Unlike

Respondent, NJSLC, broadcast stations are licensed and regulated by the FCC and operate under the constant threat of administrative sanction. Moreover, broadcast stations are "massively engaged in exactly that kind of communication which the First Amendment was written to protect."[1] Whereas Respondent NJSLC is concerned with First Amendment guarantees in the broad sense, NAB is concerned with the encroachment of the FCC on the news and editorial activities of its member stations, which are part of the "free press" directly protected by the First Amendment. *Red Lion Broadcasting Company v. F.C.C.*, 395 U.S. 367, 386 (1969); *United States v. Paramount Pictures, Inc.*, 833 U.S. 131 (1948).

Pursuant to its above-stated object, NAB herein seeks to protect the rights of its member stations to make editorial decisions and disseminate news without fear of government censorship or sanction. We believe that broadcasters as journalists and editors should determine whether or not an item is news and, if so, whether or not it should be broadcast. In its *Declaratory Ruling*, the FCC has pre-empted the news and editorial judgments of broadcasters. NAB submits that in so doing the FCC has ignored the explicit proscriptions of the First Amendment. The Court's action in this case will directly and immediately affect the interests of broadcasters in states which conduct lotteries;[2] but

---

[1] Testimony of Bill Monroe, Correspondent, NBC News, before the Subcommittee on Constitutional Rights of the Committee of the Judiciary of the United States Senate, February 2, 1972, cited in *Brandywine-Main Line Radio, Inc. v. F.C.C.*, 473 F.2d 16, 73, n. 44 (1972) (Bazelon, C. J., dissenting).

[2] Data compiled by NAB's staff indicates that 15 states have enacted laws establishing state-conducted lotteries.

all broadcasters may feel the impact of the Court's decision. Whereas this case concerns only the right to report the winning number in a state-conducted lottery in a radio or television station's regular news broadcasts, this Court's decision, if favorable to Petitioner, FCC, could open the door to further action by Congress and the FCC to circumscribe the freedom of the editorial function of broadcast journalists. Thus, NAB and all broadcasters are particularly concerned with the outcome of this case.

Wherefore, in view of the significance of this matter, the NAB respectfully requests that it be granted leave to file the annexed brief *amicus curiae* in the above-instituted proceeding.

Respectfully submitted,

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May 3, 1974

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BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF BROADCASTERS

INTEREST OF AMICUS

The National Association of Broadcasters (hereinafter NAB) submits this brief *amicus curiae* in support of Respondent, New Jersey State Lottery Commission (hereinafter NJSLC). The interest of *amicus* NAB has been stated in full in the *Motion for Leave to File Brief Amicus Curiae*, attached hereto.

PRELIMINARY STATEMENT

On September 25, 1968, the Federal Communications Commission (hereinafter FCC) issued a *Declaratory Ruling*,[1] holding that the lottery statute, 18 U.S.C. §1304 (1964), and the FCC's lottery rules, 47 C.F.R. §§73.122, 73.292, 73.656 (1972), applied to state-conducted lotteries. Additionally, the FCC ruled on the legality of several specific types of proposed broadcasts. On August 11, 1969, the United States Court of Appeals for the Second Circuit set aside the *Declaratory Ruling*[2] and remanded it to the FCC for reconsideration in light of the court's holding. *New York State Broadcasters Association, Inc. v. United States*, 414 F.2d 990 (2nd Cir. 1969), *cert. den.*, 396 U.S. 1061 (1970). While agreeing with the FCC that 18 U.S.C. §1304 did apply to state-conducted lotteries, the court held that the prohibition against broadcast of "information concerning any lottery," 18 U.S.C. §1304 (1964), applied "only to information that directly promotes a particular existing lottery." *New York State Broadcasters Association, supra*, at 997. Subsequently, on March 2, 1970, the FCC released a *Supplemental Declaratory Ruling*[3] in response to the court's expectation that the FCC "apply its expertise" in providing "more specific guidance" as to what information may and may not be broadcast.

On February 18, 1971, Jersey Cape Broadcasting Corporation requested that the FCC issue a declaratory ruling as to the broadcast of the following statement during three

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[1] 14 F.C.C.2d 707 (1968).

[2] *Id.*

[3] 21 F.C.C.2d 846 (1970).

consecutive regular newscasts commencing at noon each Thursday, the day on which the winning number of the New Jersey state-conducted lottery was selected:

"The winning state lottery number drawn today is (and then recite the winning number)."

The FCC ruled that the broadcast would violate 18 U.S.C. §1304 and the FCC's Rules, 47 C.F.R. §§73.122, 73,292, 73.656.[4] Petitions for reconsideration filed by the New Jersey State Lottery Commission and by several state and local officials were denied by the FCC.[5] On January 2, 1974, the United States Court of Appeals for the Third Circuit reversed the FCC's *Declaratory Ruling*, holding that the broadcast involved would be unadulterated broadcast journalism and, therefore, protected by the First Amendment and the Communications Act of 1934, 47 U.S.C. §326 (1964). *New Jersey State Lottery Commission v. United States*, ___ F.2d ___ (3rd Cir. 1974).[6]

NAB submits that the decision of the Third Circuit in *New Jersey State Lottery Commission v. United States, supra*, is correct, that the First Amendment does bar FCC censorship of news reports, as well as the imposition of any subsequent sanction for broadcast of a particular news report. Thus, NAB respectfully urges this Court to affirm the decision of the Third Circuit to prevent the FCC from

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[4] *Declaratory Ruling*, 30 F.C.C.2d 794 (1971) (hereinafter cited as *Declaratory Ruling*).

[5] *Memorandum Opinion and Order*, 36 F.C.C.2d 93 (1972) (hereinafter cited as *Reconsideration*).

[6] The court's opinion is reproduced in Petitioners' *Petition for a Writ of Certiorari*, at Appendix A.

illegally and unconstitutionally tampering with the content of radio and television news broadcasts.

ARGUMENT

I. THE FCC'S *DECLARATORY RULING* OPERATES AS AN UNCONSTITUTIONAL PRIOR RESTRAINT ON BROADCAST NEWS.

The federal anti-lottery statute, 18 U.S.C. §1304 (1964), provides that:

> Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> Each day's broadcasting shall constitute a separate offense.

The FCC's Rules, §§73.122, 73.292, 73.656 (1972), are based on 18 U.S.C. §1304 and contain similar language. The FCC's *Declaratory Ruling* explicitly holds that broadcast of the winning number of a state-conducted lottery in a broadcast news report would violate 18 U.S.C. §1304 and the FCC Rules, §§73.122, 73,292, 73.656 (1972). In that

they are not directly prohibitory, but provide for subsequent punishment, the statute, 18 U.S.C. §1304 (1964) and the FCC Rules, §§73.122, 73,292, 73,656, do not constitute a prior restraint *per se*. Nor does the FCC *Declaratory Ruling* have the same direct prohibitory effect as a court injunction. See, *e.g.*, *New York Times v. United States*, 403 U.S. 713 (1971); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). Nonetheless, in intent and effect it does operate as a prior restraint on the broadcast of a specific news item. Any broadcast licensee would be subject to administrative and criminal sanctions for broadcasting a news report of the winning lottery number, just as the newspaper in *Near v. Minnesota, supra*, was punishable for contempt of court if it published material suppressed by the court's injunction granted pursuant to a Minnesota statute. Thus, Mr. Chief Justice Hughes described the operation of the Minnesota statute as "effective censorship." 283 U.S. at 712. In fact, the FCC's *Declaratory Ruling* falls within the historical and authentic definition of censorship "that no publication can see the light of day unless it is approved in advance by a censor. . . ."[7] Whereas broadcast licensees are not required to submit program material to the FCC for clearance, in this case, a proposed news report was submitted to the FCC *prior to broadcast*, and the FCC ruled that the broadcast was prohibited. Clearly, the FCC's *Declaratory Ruling* can be viewed as nothing less than a prior restraint on broadcast news reporting.

As a prior restraint on broadcast news, the FCC's *Declaratory Ruling* violates the First Amendment. The chief purpose of the First Amendment guarantee of "freedom

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[7] Paul C. Kauper, "The Role of the Press in a Democratic Society", *Editor & Publisher*, February 16, 1974, at 7.

of the press," U.S. Const., Amend. 1, is to prevent previous restraints upon publication. *Near v. Minnesota, supra,* 283 U.S. at 713. Thus, as the Chief Justice indicated in *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971):

> Any prior restraint on expression comes to this Court with a "heavy presumption" against its constitutional validity. *Carroll v. Princess Anne,* 393 U.S. 175, 181, 21 L.Ed. 2d 325, 331, 89 S. Ct. 347 (1968); *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70, 9 L.Ed. 2d 584, 593, 83 S. Ct. 631 (1963).

Whereas the protection against prior restraint is not absolute, limitations have been recognized only in exceptional cases. *Near v. Minnesota, supra,* 283 U.S. at 716. For example, the Court in *Near* noted that speech which hindered the nation's war effort, *Schenck v. United States,* 249 U.S. 47, (1919), incitements to violent overthrow of the government or words that have "all the effect of force," *Gompers v. Bucks Stove and Range Co.,* 221 U.S. 418, 439 (1911), might be subject to prior restraint. 283 U.S. at 716. In the more than three decades since *Near v. Minnesota,* no other standards for weighing the broad right of the press to publish and the very narrow right of the government to restrain publication have been developed. *New York Times v. United States,* 403 U.S. 713, 761 (1971).

The present case falls far outside the ambit of the exceptional cases recognized in *Near v. Minnesota, supra.* A news report of the winning lottery number poses no comparable, if indeed any, threat to the continued existence of this nation, its government, or any of its people. In

fact, state governments which operate lotteries, pursuant to legislation, do so to increase state revenues, thereby providing more and better services to the people of the states.

Moreover, what the present case does involve is a restraint on the dissemination of news by the press, and the Court in *Near* never intended to sanction any such restraint. Dissenting in *Kunz v. New York,* 340 U.S. 290, 307 (1957), Mr. Justice Jackson stated that *Near v. Minnesota, supra,* precluded *any* prior restraint on the press:

> Of course, as to the press, there are the best of reasons against any licensing or prior restraint. Decisions such as *Near v. Minnesota,* 283 U.S. 697, 75 L.Ed. 1357, 51 S. Ct. 625, *supra,* hold any licensing or prior restraint of the press unconstitutional and I heartily agree.

More recently, in his dissent in *New York Times v. United States, supra,* the Chief Justice pointed out the continuing validity of the principles espoused by the Court in *Near:*

> So clear are the constitutional limitations on prior restraint against expression, that from the time of *Near v. Minnesota,* 283 U.S. 697, 75 L.Ed. 1357, 51 S. Ct. 625 (1931) until recently in *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 29 L.Ed. 2d 1, 91 S. Ct. 1575 (1971), we have had little occasion to be concerned with cases involving prior restraints against news reporting in matters of public interest. 403 U.S. at 748.

This Court consistently has recognized that freedom from prior restraint is the most essential of First Amendment guarantees. The FCC's *Declaratory Ruling* operates

as a prior restraint on and censorship of news. Therefore, NAB submits that the FCC's *Declaratory Ruling* contravenes the most basic constitutional guarantees of freedom of the press.

II. IN DETERMINING THAT A NEWS REPORT OF THE WINNING LOTTERY NUMBER IS A LIMITED NEWS ITEM AND, THUS, NOT ENTITLED TO FIRST AMENDMENT PROTECTION, THE FCC HAS IGNORED THE FULL, UNEQUIVOCAL PROTECTION AFFORDED BROADCAST NEWS BY THE FIRST AMENDMENT.

The FCC's *Declaratory Ruling* that a broadcast news report of the winning lottery number was prohibited apparently was premised on the determination that limited news items are not entitled to the protection of the First Amendment, U.S. Const., Amend. 1. In its *Declaratory Ruling*, the FCC distinguished between legitimate news items of general interest and limited news items. The FCC cited a *bona fide* news announcement of persons who won the top lottery prizes as an example of a legitimate news item and stated explicitly that it was protected by the First Amendment. In contrast, the FCC ruled that a news report of the winning number was the kind of limited news item that was prohibited by 18 U.S.C. §1304 (1964) and the FCC's Rules, 47 C.F.R. §§73.122, 73.292, 73.656 (1972), because it would directly promote a lottery. 30 F.C.C.2d at 795.

The FCC's action severely compromises the full, unequivocal protection afforded radio and television news reporting by the First Amendment. Although radio and television were "unknown media when freedom of the press was written into the Bill of Rights,"[8] speech and press

[8] *Rosenbloom v. Metromedia, Inc.*, 415 F.2d 892, 895 (3d Cir. 1969), *aff'd* 403 U.S. 29 (1971).

on radio and television "are freedoms protected by the First Amendment."[9] In *United States v. Paramount Pictures*, 334 U.S. 131, 166 (1948), Mr. Justice Douglas, speaking for an eight-member majority of this Court, first recognized broadcasters' First Amendment rights:

> We have no doubt that moving pictures, like newspapers *and radio*, are included in the press whose freedom is guarantted by the First Amendment. [Emphasis added].

This Court has never retreated from that basic position. Most recently in *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 160 (1973), Mr. Justice Douglas, concurring, pointed out that

> [T]he old fashioned First Amendment that we have is the Court's only guideline; and one hard and fast principle which it announces is that government shall keep its hands off the press. That principle has served us through days of calm and eras of strife and I would abide by it until a new First Amendment is adopted. That means, as I view it, that TV and radio, as well as the more conventional methods for disseminating news, are all included in the concept of "press" as used in the First Amendment and therefore are entitled to live under the laissez faire regime which the First Amendment sanctions.

Although the special characteristics of the broadcast media have on occasion justified the application of different First Amendment standards to radio and television, the present

[9] *Rumely v. United States*, 197 F.2d 166, 177 (D.C. Cir. 1952), *aff'd* 345 U.S. 41 (1953).

case involves news reporting and is easily distinguishable. In *Red Lion Broadcasting Company v. Federal Communications Commission*, 395 U.S. 367, 390 (1969), this Court found that "It is the right of the viewers and listeners, not the right of the broadcasters which is paramount." Thus, the Court held that the FCC's personal attack rules which require that broadcast licensees provide reply time to persons attacked on their facilities did not violate the First Amendment. However, the Court was careful to note that:

> There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program. . . . Such questions would raise more serious First Amendment issues. 395 U.S. at 396.

Similarly, in *Banzhaf v. Federal Communications Commission*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. den.*, 396 U.S. 482 (1969), the court held that an FCC ruling requiring radio and television stations which carried cigarette advertising to devote broadcast time to views against cigarette smoking did not violate the First Amendment. Chief Judge Bazelon indicated that the court so held because no speech was actually banned and because product advertising is "less vigorously protected than other forms of speech." 405 F.2d at 1101. In contrast, the FCC's *Declaratory Ruling* does actually ban speech. Moreover, it bans, not advertisements, but news, which is entitled to the greatest possible protection of the First Amendment. *Cf. New York Times v. United States*, 403 U.S. 713 (1971).

Radio and television are media of entertainment, instruction, opinion and advertising, but their most vital and distinctive function is rapid dissemination of news. In the *Rosenbloom* case, *supra*, the court recognized the

"more apparent" need for constitutional protection of broadcast news reporting because its primary value to the public is in "conveying the latest news as promptly as possible so that it has the opportunity to be informed of news items of possible immediate public concern." 415 F.2d at 855.

Moreover, broadcasting has become the pre-eminent news medium.[10] Chief Judge Bazelon recently recognized this in his dissent in *Brandywine-Main Line Radio, Inc. v. Federal Communications Commission*, 473 F.2d 16, 73 (D.C. Cir. 1972), *cert. den.*, ___ U.S. ___ (1973):

> Today we have arrived at different constitutional definitions as to what is protected speech. Certainly broadcasting is included. But perhaps more significant is the fact that most Americans now consider television and radio to be their most important news source. [Footnotes omitted].

In this age of rapid, pervasive electronic journalism, the First Amendment would be but a relic of lost freedoms if it failed to fully and unequivocally protect broadcasters' rights to edit and report news without fear of government interference. Clearly, as Mr. Justice Stewart recognized in his concurring opinion in the *Columbia Broadcasting System* case, *supra:*

> The First Amendment prohibits the government from imposing controls upon the press. Private broadcasters are surely part of the press. [Footnote omitted]. 412 U.S. at 133.

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[10] 1972 survey conducted by the Roper Organization, Inc., showed television to be the main source of news. What the People Think of Television and Other Mass Media 1959-1972, Report by the Roper Organization, Inc., p. 2, May 1973.

Moreover, in reserving for itself the power to decide what is legitimate news and what is limited news, the FCC has shown utter disregard for the fundamental First Amendment value that editorial judgments be made by editors. This principle was stated most succinctly by Mr. Justice Stewart, concurring in *Columbia Broadcasting System, supra:*

> For if [First Amendment] "values" mean anything, they should mean at least this: If we must choose whether editorial decisions are to be made in the free judgment of individual broadcasters or imposed by bureaucratic fiat, the choice must be for freedom. 412 U.S. at 146.

NAB respectfully submits that in this regard it is particularly important that the decision of the Third Circuit be affirmed. Any notion that the FCC can impose its journalistic judgments on broadcast news editors must be dispelled and disavowed by this Court. A free press is truly free only if editorial decisions can be made in an atmosphere unpolluted by the threat of government censorship. or sanction. If the decision of this Court in this case leaves even the slightest impression that the FCC can, on occasion, act as a super editor of broadcast news, the federal government will have gained an unprecedented stranglehold on the flow of news to the American people. The door would be opened for Congressional, Executive and administrative actions, purportedly to protect the public interest, restricting dissemination of certain news items, deemed limited news items so as to circumvent the otherwise uncompromising guarantees of the First Amendment. Even the remotest possibility of this sort of government supervision of the press must be foreclosed.

CONCLUSION

Amicus NAB submits that the FCC's *Declaratory Ruling* imposes an unconstitutional prior restraint on broadcast news reporting. Moreover, in determining the newsworthiness of a certain item the FCC has supplanted the editorial judgments of broadcast licensees. The First Amendment will not tolerate such government interference with broadcast news reporting. Broadcast journalists are part of the press entitled to the full, unequivocal protection of the First Amendment, and prior restraints are particularly antithetical to First Amendment values. Furthermore, Congress provided that the FCC should be a regulator, not a censor or an editor. Nothing could be more contrary to the FCC's prescribed role or present a more insidious threat to freedom of the press than FCC censorship of broadcast news reporting.

NAB respectfully submits that this Court should not accord the slightest recognition to any right of the FCC to declare broadcasts of certain news items illegal. The First Amendment must continue to stand as an impenetrable barrier to the tentacles of government censorship or control of broadcast news. In short, the press is either free or it is not free to report the news as it sees fit, and, once the door is open to government control, it is not free.

WHEREFORE, for the reasons stated, NAB respectfully requests that this Court affirm the judgment of the Court of Appeals for the Third Circuit holding the FCC's *Declaratory Ruling* an unconstitutional abridgement of freedom of the press.

Respectfully submitted,

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